

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925 1926

No. 3 3

CHARLOTTE ANITA WHITNEY, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

**APPEAL FROM THE DISTRICT COURT OF APPEAL, FIRST APPELLATE
DISTRICT, DIVISION ONE, OF THE STATE OF CALIFORNIA**

FILED JUNE 16, 1933

(29,685)

(1875-76)

(29,685)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 375

CHARLOTTE ANITA WHITNEY, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

IN ERROR TO THE DISTRICT COURT OF APPEAL, FIRST APPELLATE
DISTRICT, DIVISION ONE, OF THE STATE OF CALIFORNIA

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[fol. 1]

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

1st Crim., 907; Crim., No. 2475

[Title omitted]

ORDER DENYING HEARING—Filed June 24, 1923

By the COURT:

The petition to have the above entitled cause heard and allowed by this court after judgment in the District Court of Appeal of the First Appellate District, Division One, is denied.

Shaw, C. J. Lawlor, J. Lennon, J., Dissenting.

Shurtleff, J., Absent.

Dated this 24th day of June, 1922.

[File endorsement omitted.]

[fol. 2] IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT, DIVISION ONE

(Criminal, #907)

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

CHARLOTTE ANITA WHITNEY

JUDGMENT

"San Francisco, Tuesday, April 25, 1922.

Division One, Criminal 907. The People etc., vs. Whitney. Judgment affirmed.

Richards, J. We concur: Tyler, P. J. Kerrigan, J."

[fol. 3] IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT, DIVISION ONE

No. Crim. 907

[Title omitted]

On Appeal from the Superior Court in and for the County of Alameda

REMITTITUR

San Francisco, April 25, 1922.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the Court herein is delivered by Richards, J. (Here follows a copy of the Opinion herein of the District Court of Appeal First Appellate District, Division One, same being incorporated elsewhere in this transcript.) We Concur:

Tyler, P. J. Kerrigan, J.

Whereupon it is ordered, adjudged and decreed by the Court that the Judgment of the Superior Court in and for the County of Alameda in the above entitled cause, be and the same is hereby affirmed.

I, J. B. Martin, Clerk of the District Court of Appeal of the State of California, in and for the First Appellate District, do hereby certify that the foregoing is a true and correct copy of an original judgment entered in the above entitled cause on the 25th day of April, 1922, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 26th day of June, A. D. 1922.

J. B. Martin, Clerk, By Walter S. Chisholm, Deputy. (Seal.)

[fol. 4]

[File endorsement omitted]

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT, DIVISION ONE

[Title omitted]

OPINION, RICHARDS, J.—Filed April 25, 1922

This appeal is from a judgment of conviction of the defendant for the alleged violation of the provisions of the Criminal Syndi-

calism Act. The information filed by the district attorney against the defendant consisted of five separate counts based upon the several subdivisions of said act. The jury found the defendant guilty as to the first count in the information but disagreed as to the other counts therein and dismissals as to these were subsequently filed. The charging part of the first count in said information upon which the conviction of the defendant was had is in the language of the statute and reads as follows:

"The said Charlotte A. Whitney prior to the time of filing this information, and on or about the 28th day of November, A. D. nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlawfully, wilfully, wrongfully, deliberately and feloniously organize and assist in organizing, and was, is, and knowingly became a member of an organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism."

The first contention of the appellant herein is that said first count in said indictment, of which the foregoing excerpt is the charging part, was insufficient to state a public offense, the alleged particular insufficiency therein being its omission to specifically designate the name of the organization, society, group, or assemblage of persons which she is charged with having organized and assisted in organizing and which were organized and assembled to teach, aid and abet criminal syndicalism. Since the original submission of this cause [fol. 5] the Supreme Court has decided the case of *People v. Taylor*, 62 Cal. Dec. 546, covering the precise point which the appellant urges upon this contention. The two cases are identical as to the form of the charge and as to the procedure with relation to the trial therein in the trial court. In each case the defendant was fully advised upon the voir dire examination of the jurors and in the opening statement of the district attorney that the organization which the defendant was charged with having organized and assisted in organizing in violation of the terms of the criminal syndicalism act was the Communist Labor Party of Oakland, a local branch of the Communist Party of California. This being so we are bound in conformity with the decision in *People v. Taylor*, supra, to hold that the appellant's first contention is void of merit.

The next contention which the appellant urges upon this appeal is that the evidence is insufficient to justify her conviction upon said count in the information. The record is voluminous and no useful purpose would be subserved by a detailed review of the evidence which it contains. Upon the main question, however, as to the part which the defendant took in organizing and assisting to organize the Communist Labor Party, there is no dispute. In the brief of the appellant upon this appeal it is stated to be an "admitted fact that the defendant became a member of the so-called Communist Labor Party, attended a party convention Nov. 9th, 1919, and was one of the committee on resolutions which reported the platform herein above set forth." In addition to the foregoing admission

the evidence abundantly shows that the defendant not only took a leading and active part in the organization of the Oakland branch of the Communist Labor Party of California, but also in the subsequent meetings and acts of said organization. Notwithstanding this admission and these proofs, the appellant insisted upon the trial of the cause and now insists, that said organization was not of such character and purposes as to bring it within the class of organizations forbidden and condemned by the terms of the Criminal Syndicalism Act. It was upon this branch of the case that the larger part of the [fol. 6] evidence adducted on behalf of the prosecution upon the trial of this cause was presented. It is the appellant's contention that the admission of a very large portion of such evidence designed to show the pernicious activities of other organizations with which the Communist Labor Party of California was affiliated, or regarding which, or the membership of which, it from time to time by resolution or otherwise expressed its approval and sympathy, was highly prejudicial to the defendant's case, particularly in view of the fact that as is claimed her knowledge of and participation in these baneful activities was not sufficiently shown. As to the propriety of the admission of such evidence as tending to show the character and purposes of the Communist Labor Party of California there can be no further doubt, in view of the very full discussion of this subject in the case of *People v. Taylor*, supra, and of the determination of the Supreme Court therein. As to the knowledge which the defendant had and of her participation in the aims, expressions and activities of the Communist Labor Party of California there can also be no doubt, in view of the admitted intelligence of the defendant and of her participation in the drafting of the resolutions and formulation of the constitution of the organization itself. That this defendant did not realize that she was giving herself over to forms and expressions of disloyalty and was, to say the least of it, lending her presence and the influence of her character and position as a woman of refinement and culture to an organization whose purposes and sympathies savored of treason, is not only past belief but is a matter with which this court can have no concern, since it is one of the conclusive presumptions of our law that a guilty intent is presumed from the deliberate commission of an unlawful act. (C. C. P. Sec. 1962).

As to the appellant's only remaining contention with relation to the alleged misconduct of the district attorney upon the examination of a juror, we have examined the record and do not find that the episode complained of was of such prejudicial character or consequence as to justify a reversal of the case.
[fol. 7] Judgment affirmed.

Richards, J. We concur: Tyler, P. J. Kerrigan, J.

[fol. 8] IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, DIVISION ONE

[Title omitted]

STIPULATION AS TO RECORD TO BE SENT TO SUPREME COURT OF THE UNITED STATES—Filed Mar. 16, 1923

It is hereby stipulated by the respective counsel for the hereinabove named parties that the record or writ of error heretofore issued out of the Supreme Court of the United States to the District Court of Appeal of the State of California, for the First Appellate District, Division One, shall consist of the following:

1. The clerk's transcript on appeal from final judgment of the Superior Court of the State of California in and for the County of Alameda and from the order of said court denying defendant's motion for a new trial in the above entitled action.

2. The following extracts from the reporter's transcript on appeal, as prepared by the official reporter in the matter of the People of the State of California, Plaintiff, vs. Charlotte A. Whitney, Defendant, No. 7456, heretofore pending in the Superior Court of the State of California, in and for the County of Alameda, Department No. 5:

- a. Pages 1-3, line 15 inclusive.
- b. Page 202-page 207, line 18 inclusive.
- c. Page- 209-275, line 24 inclusive.
- d. Page- 286-318, line 16 inclusive.
- e. Page 340, line 19 to page 360, line 13 inclusive.
- f. Pages 371-372 inclusive.
- g. Page 379, line 18 to page 466, line 3 inclusive.
- h. Page 477, line 14 to page 482 inclusive.
- i. Page 493, line 2 to Page 493, line 28 inclusive.
- [fol. 9] j. Page 546 to 573, line 2 inclusive.
- k. Page- 579 to 592, line 13 inclusive.
- l. Pages 621 to 655 inclusive.
- m. Pages 678, line 6 to 703 inclusive.
- n. Pages 711, line 9 to 714, line 17 inclusive.
- o. Pages 716, line 12 to 751 inclusive.
- p. Pages 881, line 18 to Page 904, line 26 inclusive.
- q. Pages 913 to 956 inclusive.

3. Opinion of District Court of Appeal in and for the First Appellate District, Division One, with all endorsements thereon.

4. Minute order of District Court of Appeal, First Appellate District, Division One, affirming judgment.

5. Order of Supreme Court of the State of California denying appellant's petition for hearing after decision by the District Court of Appeal, and endorsements thereon.

6. The Remittitur, omitting therefrom the copy of the opinion of said District Court of Appeal and indicating such omission by the following statement in brackets, "Here follows a copy of the opinion herein of the District Court of Appeal, First Appellate District, Division One, same being incorporated elsewhere in this transcript."

7. Petition for writ of error of defendant and plaintiff in error, with endorsements thereon.

8. Assignment of errors of defendant and plaintiff in error, and endorsements thereon.

9. Order allowing writ of error, and endorsements thereon.

10. Writ of error, with endorsements thereon.

11. Citation on writ of error, with endorsements thereon.

12. Bond on writ of error, and endorsements thereon.

13. This stipulation for transcript.

[fol. 10] And the Clerk of said District Court of Appeal of the State of California, First Appellate District, Division One, is hereby requested by the undersigned to transmit the aforesaid papers and record designated herein as constituting the transcript of record on said writ of error, duly certified, under his seal and the seal of the said District Court of Appeal.

U. S. Webb, Attorney General of California; John H. Riordan, Deputy, Attorneys for Plaintiff and Defendant in Error. Walter Nelles, John Francis Neylan, Attorneys for Defendant and Plaintiff in Error.

[File endorsement omitted.]

[fol. 11] IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT, DIVISION ONE

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed July 13, 1922.

To the Honorable John F. Tyler, Presiding Justice of the District Court of Appeal for the First Appellate District, Division One, and to the Honorable the Associate Justices of said Court, and to the Honorable the District Court of Appeal of the State of California for the First Appellate District, Division One:

Your petitioner herein, Charlotte Anita Whitney, defendant and plaintiff in error in the above entitled cause, respectfully shows:

That on the 25th day of April, 1922, this court gave, made and rendered its decision, order and judgement affirming the judgment in said cause given, made and rendered by the Superior Court of the State of California in and for the County of Alameda on the 24th day of February, 1920, which judgment was in favor of the plaintiff and defendant in error herein, and against your petitioner, the defendant and plaintiff in error above named.

And your petitioner herein further shows that on or about the 3d day of June, 1922, your petitioner duly filed, in the Supreme Court of the State of California, her petition for a hearing in and by said Supreme Court after said decision, order and judgment by this court, said petition having been filed within the time prescribed by, and in accordance with, the laws of the State of California and the rules of the Supreme Court of the State of California, and that [fol. 12] upon the 24th day of June, 1922, said Supreme Court gave, made and rendered its decision, order and judgment denying such petition for hearing by said Supreme Court and refusing to accept jurisdiction of said cause, as a consequence of which the judgment rendered by this court on the 25th day of April, 1922, as aforesaid, became final and was and is a final judgment in the highest court of the State of California in which a decision in said suit and cause can be had;

And your petitioner herein further shows that in and by said decision, order and judgment of this court and the proceedings had prior thereunto in this cause and in and by the said decision, order and judgment of said Supreme Court, certain errors were committed, to the prejudice of your petitioner, all of which will more in detail appear from the assignment of errors which is filed with this petition;

And your petitioner herein further shows that as appears by the records and the proceedings in said cause, there was therein drawn in question, in and before this court, and in and before the said Superior Court, and in and before said Supreme Court of the State of California, respectively, the validity of a statute of, or an authority exercised under said State of California, to-wit, "An Act defining criminal syndicalism and sabotage, describing certain actions and methods in connection therewith, and in pursuance thereof, and providing penalties and punishments therefor" (Stat. of California, 1919, chap. 188), on the ground of their being repugnant to the Constitution of the United States and in particular to the Fourteenth Amendment to the said Constitution of the United States, and the decision was in favor of their validity;

[fol. 13] And your petitioner further shows that, as appears by the records and proceedings in said cause, there was therein drawn in question in and before this court, and in and before the said Superior Court, and in and before the said Supreme Court of the State of California, respectively, a right, privilege or immunity claimed under the Constitution of the United States, and particularly under the Fourteenth Amendment to said Constitution of the United States, and said decision was against the right, privilege

and immunity set up and claimed by your petitioner herein under such Constitution.

Wherefore, your petitioner prays that a writ of error may issue to this court, and that your petitioner may be allowed to bring up for review before the Supreme Court of the United States said decision, order and judgment of the said District Court of Appeal of the State of California, First Appellate District, Division One, for the correcting of the errors complained of; that said decision, order and judgment of the said District Court of Appeal, and also said judgment of the said Superior Court and each of them be reversed; that the necessary citation provided by law be granted and signed; that the bond herewith presented be approved, and that upon a compliance with the terms of the statute in such cases made and provided, said bond may and do operate as a supersedeas; that a duly authenticated transcript of the records, proceedings and papers herein be ordered to be sent to the Supreme Court of the United States; and that such other, further or different order or relief as may be deemed just and proper in the premises may be granted.

Charlotte Anita Whitney, Petitioner and Plaintiff in Error.
John Francis Neylan, Nathan C. Coghlan, Attorneys for
Petitioner and Plaintiff in Error.

[fol. 14] Presented to and received by me this 13th day of July, 1922.

John T. Tyler, Presiding Justice of the District Court of Appeal of the State of California for the First Appellate District, Division One.

[fol. 15] [File endorsement omitted.]

[fol. 16] IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, DIVISION ONE

Criminal, #907

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 13, 1922.

Now comes Charolette Anita Whitney, defendant and plaintiff in error in the above entitled cause, and files the following assignment of errors upon which she will rely upon her prosecution of her writ of error in the above entitled cause;

I. That the Supreme Coure of the State of California erred in denying the petition for a hearing of said cause in and by said Supreme Court, after decision, order and judgment therein given,

made and rendered by the District Court of Appeal, of the State of California, First Appellate District, Division One, affirming the judgment in said cause given, made and rendered by the Superior Court of the State of California, in and for the County of Alameda, in favor of plaintiff and defendant in error above named and against defendant and plaintiff in error above named, for the reason that the record discloses that said decision, order and judgment of said Superior Court if allowed to stand will deny said defendant and plaintiff in error the equal protection of laws. Contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, and for the further reason that said decision, order and judgment if allowed to stand will constitute a denial of the rights of said defendant and plaintiff in error under the provisions of [fol. 17] the Fourteenth Amendment to the Constitution of the United States providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

II. That said District Court of Appeal of the State of California, First Appellate District, Division, Division One, erred in affirming the judgment in said cause given, made and rendered by the said Superior Court for the reason that the record discloses that said decision, order and judgment of said Superior Court if allowed to stand will deny said defendant and plaintiff in error the equal protection of laws, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, and for the further reason that said decision, order and judgment if allowed to stand will constitute a denial of the rights of said defendant and plaintiff in error under the provisions of the Fourteenth Amendment to the Constitution of the United States providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

III. That the said Superior Court erred in giving, making and rendering its said judgment in said cause for the reason that the record discloses that said decision, order and judgment of said Superior Court if allowed to stand will deny said defendant and plaintiff in error the equal protection of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, and for the further reason that said decision, order and judgment if allowed to stand will constitute a denial of the rights of said defendant and plaintiff in error under the provisions of [fol. 18] the Fourteenth Amendment to the Constitution of the United States providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

IV. That said Superior Court erred in overruling the demurrer of defendant and plaintiff in error above named to the information filed against said defendant and plaintiff in error by the District Attorney of the County of Alameda, State of California, said demurrer in part being on the ground that the purported statute

under which said information was filed was and is void, invalid and unconstitutional.

V. That the said Superior court erred in denying the motion of defendant and plaintiff in error above named to set aside the information filed against said defendant and plaintiff in error by the District Attorney of the County of Alameda, State of California.

VI. That the said Superior Court erred in denying defendant's motion for new trial in the above entitled cause.

VII. That the said Superior Court erred in denying the motion of defendant and plaintiff in error above named for a bill of particulars in the above entitled cause.

VIII. That the said District Court of Appeal erred in affirming the decision, order and judgment of the said Superior Court in overruling the demurrer of defendant and plaintiff in error above named, interposed to the information filed by the District Attorney [fol. 19] of the County of Alameda, State of California; and erred in affirming the decision, order and judgment of the said Superior Court in denying the motion of defendant and plaintiff in error above named to set aside the information filed against said defendant and plaintiff in error by the District Attorney of the County of Alameda, State of California; and erred in affirming the decision, order and judgment of said Superior Court denying the motion of defendant and plaintiff in error above named for a new trial; and erred in affirming the decision, order and judgment of said Superior Court denying the motion of defendant and plaintiff in error for a bill of particulars in said cause.

IX. That said Superior Court erred in holding that the so-called "Criminal Syndicalism Law," to-wit, "An Act defining criminal syndicalism and sabotage, describing certain actions and methods in connection therewith, and in pursuance thereof, and providing penalties and punishments therefor" (Stat. of California 1919, Chap. 188), is not and was not in violation of Section One of the Fourteenth Amendment to the Constitution of the United States, providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, providing further that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

X. That the said District Court of Appeal erred in holding that the so-called "Criminal Syndicalism Law," to-wit, "An Act defining criminal syndicalism and sabotage, describing certain actions and methods in connection therewith, and in pursuance thereof, and providing penalties and punishments therefor." (Stat. of [fol. 20] California 1919, Chap. 188), is not and was not in violation of Section One of the Fourteenth Amendment to the Constitution of the United States, providing that no state shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States, providing further that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

XI. That the said Supreme Court erred in failing to grant a hearing of the above entitled cause and in failing to reverse the judgment of the District Court of Appeal of the State of California, First Appellate District, Division One, and the judgment, order and decree of the Superior Court of the State of California, in and for the County of Alameda, said judgment of said District Court of Appeal and said judgment, order and decree of said Superior Court being to the effect that the so-called "Criminal Syndicalism Law" was and is constitutional and not in violation of the provisions of Section One of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, your petitioner prays that a writ of error may issue to this court, and that your petitioner may be allowed to bring up for review before the Supreme Court of the United States said decision, order and judgment of said District Court of Appeal of the State of California, First Appellate District, Division One, for the correcting of the errors complained of; and that said decision, order and judgment of said District Court of Appeal, and also said judgment of said Superior Court, and each of them, be reversed; and that the necessary citation provided by law be granted and signed; [fol. 21] that the bond herewith presented be approved and that, upon a compliance with the terms of the statute in such cases made and provided, may and do operate as a supersedeas; that a duly authenticated transcript of the records, proceedings and papers herein be ordered to be sent to the Supreme Court of the United States, and that such other, further or different order or relief as may be deemed just and proper in the premises may be granted.

Charlotte Anita Whitney, Defendant and Plaintiff in Error.

John Francis Neylan, Nathan C. Coghlan, Attorneys for Defendant and Plaintiff in Error.

[fol. 22] [File endorsement omitted.]

[fol. 23] IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT, DIVISION ONE

[Title omitted]

ORDER ALLOWING WRIT OF ERROR AND DIRECTING EXECUTION OF BOND—Filed July 13, 1922

On this 13th day of July, 1922, came the plaintiff in error above named, by her attorneys, John Francis Neylan, Esq., and Nathan C.

Coglan, Esq., and filed herein and presented to this Court and to the Honorable John F. Tyler, Presiding Justice thereof, her petition praying for the allowance of a writ of error, and filed and presented therewith an assignment of error intended to be urged by her, and praying further that the necessary citation be granted; that a transcript of the records, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further order and relief as may be just and proper in the premises be granted;

Upon consideration whereof it is hereby ordered that a writ of error herein be allowed and that the same issue out of the Supreme Court of the United States directed to the District Court of Appeal of the State of California, First Appellate District, Division One, as in and by said petition prayed; provided, however, that said Charlotte Anita Whitney, plaintiff in error, give bond according to law in the sum of Five Thousand dollars (\$5000.00) which said [fol. 24] bond shall operate as a supersedeas bond.

Dated: this 13th day of July, 1922.

John F. Tyler, Presiding Justice of the District Court of Appeal of the State of California, First Appellate District, Division One.

[fol. 25] [Filed endorsement omitted.]

[fol. 26] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

WRIT OF ERROR—Filed July 13, 1922

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the District Court of Appeal of the State of California for the First Appellate District, Division One, and to the Honorable Presiding Justice and the Associate Justices of said Court, Greeting:

Because in the record and proceedings and also in the rendition of the judgment before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in said suit between The People of the State of California, Plaintiff and Defendant in Error, and Charlotte Anita Whitney, Defendant and Plaintiff in Error, wherein was drawn in question the validity of a statute of, or an authority exercised under the State of California, to-wit, "An Act defining criminal syndicalism and sabotage, describing certain actions and methods in connection therewith and in pursuance thereof and providing penalties and punishment

therefor" (Stat. California 1919, chap 188), on the ground of their being repugnant to the Constitution of the United States and in particular to the Fourteenth Amendment to said Constitution of the United States, and the decision was in favor of their validity;

[fol. 26a] And wherein rights, privileges and immunities are claimed under the Constitution and Statutes of the United States and particularly under the Fourteenth Amendment to the Constitution of the United States, and under authority exercised under the United States, and the decision was against the rights, privileges and immunities set up or claimed under said Constitution, Statutes and authority, a manifest error has happened to the great damage of said Charlotte Anita Whitney, as by her complaint appears, we, being willing that the error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that after judgment be therein given, that then under your seal distinctly and openly you send the record of the proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washington in the District of Columbia within sixty (60) days from the date hereof, in the said Supreme Court of the United States, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Wm. Howard Taft, Chief Justice of the Supreme Court of the United States, the 13th day of July in the year of our Lord one thousand nine hundred and twenty-two.

F. D. Monckton, Clerk of the United States Circuit Court of Appeals of the Ninth Circuit, by Paul P. O'Brien, Deputy Clerk. [Seal of the United States Circuit Court of Appeals, Ninth Circuit.]

[fol. 26b] Writ allowed: John F. Tyler, Presiding Justice of the District Court of Appeals, First Appellate District, Division One.

[fol. 26c] File endorsement omitted.

[fols. 26d-f] IN THE SUPREME COURT OF THE UNITED STATES

BOND ON WRIT OF ERROR FOR \$5,000.00—Approved and filed July 18, 1922, omitted in printing

[fols. 26 g & h] IN THE DISTRICT COURT OF APPEAL OF THE STATE
OF CALIFORNIA IN AND FOR THE FIRST APPELLATE
DISTRICT, DIVISION ONE

(Criminal, No. 907)

CITATION—Filed July 13, 1922; omitted in printing

[fol. 26i] [File endorsement omitted.]

Receipt of a copy of the within Citation admitted this 13th day of
July, 1922, U. S. Webb, Attorney General, Attorney for Deft. in
Error.

[fols. 27-29] IN THE SUPERIOR COURT OF THE STATE OF CALI-
FORNIA IN AND FOR THE COUNTY OF ALAMEDA

[Title omitted]

CLERK'S TRANSCRIPT ON APPEAL FROM FINAL JUDGMENT OF THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE
COUNTY OF ALAMEDA AND FROM ORDER OF SAID COURT DENYING
DEFENDANT'S MOTION FOR A NEW TRIAL IN THE ABOVE ENTITLED
ACTION—Filed March 26, 1920

Hon. James G. Quinn, Judge.
N. C. Coghlan, Esq., and J. E. Pemberton, Esq., Mills Building,
San Francisco, Calif., Attorneys for Appellant.
U. S. Webb (Attorney General), San Francisco, Calif., Attorney
for Respondent.

[File endorsement omitted.]

[fol. 30] IN SUPERIOR COURT OF ALAMEDA COUNTY

THE PEOPLE OF THE STATE OF CALIFORNIA
against

CHARLOTTE A. WHITNEY

INFORMATION—Filed Dec. 30, 1919

In the Superior Court of the County of Alameda, State of Cali-
fornia, the 30th day of December, A. D. nineteen hundred and nine-
teen, Charlotte A. Whitney, is accused by the District Attorney of
the said County of Alameda, by this information of the crime of
felony, to-wit: a violation of an Act entitled, An Act defining crim-
inal syndicalism and sabotage, proscribing certain acts and meth-
ods in connection therewith, and in pursuance thereof, and pro-

providing penalties and punishments therefor," approved April 30th, 1919, committed as follows: The said Charlotte A. Whitney prior to the time of filing this information, and on or about the 28th day of November, A. D. nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlawfully, wilfully, wrongfully, deliberately and feloniously organize and assist in organizing, and was, is, and knowingly became a member of an organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism.

And all of the acts of the said Charlotte A. Whitney in the premises were and are contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the People of the State of California.

Second Count. And the said Charlotte A. Whitney is accused by the District Attorney of said County of Alameda by this information of the crime of felony, to-wit: a violation of an Act entitled "An Act defining criminal syndicalism and sabotage, proscribing certain acts and methods in connection therewith, and in pursuance thereof, and providing penalties and punishments therefor," approved April 30th, 1919, committed as follows: The said Charlotte A. Whitney, prior to the time of filing this information, and on or about the 28th day of November, A. D. nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlawfully, wilfully, wrongfully, deliberately and feloniously print, publish, edit, issue, circulate and publicly display books, papers, pamphlets, documents, posters and written and printed matter containing and carrying written and printed advocacy, teaching and aid and abetment of, and advising, criminal syndicalism.

And all of the acts of the said Charlotte A. Whitney in the premises were and are contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the People of the State of California.

Third Count. And the said Charlotte A. Whitney is accused by the District Attorney of said County of Alameda by this information of the crime of felony, to-wit, a violation of an Act entitled "An act defining criminal syndicalism and sabotage, proscribing certain acts and methods in connection therewith, and in pursuance thereof and providing penalties and punishments therefor," approved April 30th, 1919, committed as follows: The said Charlotte A. Whitney prior to the time of filing this information, and on or about the 28th day of November, A. D. nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlawfully, wilfully, deliberately and feloniously by spoken and written words, and by personal conduct advocate, teach, aid and abet criminal syndicalism, and the duty, necessity, and propriety of committing crime, sabotage, violence and unlawful methods of terrorism as a means of accomplishing a change in industrial ownership and control, and as a means of effecting a political change;

And all of the acts of the said Charlotte A. Whitney in the premises were and are contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the People of the State of California.

Fourth Count. And the said Charlotte A. Whitney is accused by the District Attorney of said County of Alameda by this information of the crime of felony, to-wit, a violation of an Act entitled "An Act [fol. 32] defining criminal syndicalism and sabotage, proscribing certain acts and methods in connection therewith, and in pursuance thereof and providing penalties and punishment therefor," approved April 30th, 1919, committed as follows: The said Charlotte A. Whitney prior to the time of filing this information, and on or about the 28th day of November, A. D. Nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlawfully, wilfully, wrongfully, deliberately and feloniously, by spoken and written words justify and attempt to justify criminal syndicalism and the commission and attempt to commit crime, sabotage, violence, and unlawful methods of terrorism with intent then and there to approve, advocate and further the doctrine of criminal syndicalism;

And all of the acts of the said Charlotte A. Whitney, in the premises were and are contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the People of the State of California;

Fifth Count. And the said Charlotte A. Whitney is accused by the District Attorney of said County of Alameda by this information of the crime of felony, to-wit, a violation of an Act entitled, "An act defining criminal syndicalism and sabotage, proscribing certain acts and methods in connection therewith, and in pursuance thereof and providing penalties and punishment therefor," approved April 30th, 1919, committed as follows, to-wit: The said Charlotte A. Whitney prior to the time of filing this information, and on or about the 28th day of November, A. D. Nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlawfully, wrongfully, wilfully, deliberately and feloniously by personal acts and conduct practice and commit acts, advised, advocated, taught and aided and abetted by the doctrine and precept of criminal syndicalism with intent to accomplish a change in industrial ownership and control and effecting a political change;

And all of the acts of the said Charlotte A. Whitney in the premises were and are contrary to the form, force and effect of the statute [fol. 33] in such case made and provided, and against the peace and dignity of the People of the State of California.

Ezra W. Decoto, District Attorney in and for said County of Alameda, State of California, By A. A. Rogers, Deputy District Attorney in and for the County of Alameda, State of California. Geo. E. Gross, Clerk, By L. A. Rudolph, Deputy Clerk. Ezra W. Decoto, District Attorney, By A. A. Rogers, Deputy District Attorney in and for the County of Alameda, State of California.

[File endorsement omitted.]

[fol. 34] SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND
FOR THE COUNTY OF ALAMEDA

[Title omitted]

Criminal Action No. 7456

MINUTE ENTRIES

January 6, 1920.

Present James G. Quinn, Judge; L. A. Rudolph, Clerk.

Proceedings on Arraignment

Information for Felony, to wit, Criminal Syndicalism, in Five
Counts

Comes now into Court the District Attorney, the Defendant and
her Counsel, J. E. Pemberton, Esq.

Thereupon the Defendant is duly arraigned by the Clerk under
the direction of the Court. The information herein, with all its
endorsements, is read to the Defendant and a true copy thereof fur-
nished her. Upon being informed that if the name by which she is
prosecuted is not *his* true name she must now declare her true name
or be proceeded against by the name in the information, Defendant
answers that her true name is Charlotte A. Whitney. Upon being
asked if she pleads guilty, or not guilty, to the charge in the informa-
tion herein, Defendant files a motion to set aside the Information
and after argument upon said motion to set aside the Information
the cause is by the Court ordered continued to January 7th 1920 at
9 a. m. for further hearing on said motion and for the Defendant to
plead.

(Title of Court and Cause)

Department Number 5

January 7th 1920.

James G. Quinn, Judge. L. A. Rudolph, Clerk. W. T. Mc-
Sorley, Official Reporter.

The above entitled cause coming on regularly this day for further
hearing on Motion to set aside the Information. Comes now into
Court Assistant District Attorney John U. Calkins and the Defendant
[fol. 35] and her counsel J. E. Pemberton Esq. After argument
to the Court the motion is submitted. Comes now the Court being
now fully advised in the law and the premises, whereupon it is by
the Court ordered that the Defendant's motion to set aside the Infor-
mation be and the same is denied. Comes now the Defendant and
files a Demurrer to the Information and after argument the De-

murrer to the Information is by the Court ordered submitted and the cause is by the Court ordered continued to January 8 1920 at 2 p. m. for decision on Demurrer and for the Defendant to plead.

(Title of Court and Cause)

Department Number 5

January 8th, 1920.

James G. Quinn, Judge. L. A. Rudolph, Clerk. W. T. McSorley, Official Reporter.

The above entitled cause coming on regularly this day for decision on Demurrer to the Information and for the Defendant to plead. Comes now into Court Assistant District Attorney John U. Calkins and Defendant with her counsel J. E. Pemberton, Esq. Comes now the Court being fully now advised in the law and the premises and orders that the Demurrer to the Information and the Demurrer to each and all of the counts in said Information be and the same is and are overruled. The Defendant when called upon to plead, pleads Not Guilty to the charge in the Information and pleads Not Guilty to each and all of the counts alleged in said Information.

The cause is by the Court ordered and hereby is set down for January 27th 1920 at 10 o'clock a. m. for trial.

(Title of Court and Cause)

January 15th 1920.

Hon. James G. Quinn, Judge.

The Defendant's Motion for a bill of particulars in the above entitled cause coming on this day for hearing. Comes now into Court Deputy District Attorney T. P. Wittschen and J. E. Pemberton, Esq. counsel for Defendant. The motion is submitted without argument. Comes now the Court and orders that the defendant's motion for a bill of particulars in the above entitled cause be and the same is hereby denied.

[fol. 36]

(Title of Court and Cause)

January 27, 1920.

James G. Quinn, Judge. L. A. Rudolph, Clerk. W. T. McSorley, Official Reporter.

The above entitled cause coming on regularly this day for trial. Comes now into Court Deputy District Attorneys John U. Calkins and Myron Harris and Defendant and her counsel J. E. Pemberton. Upon motion of J. E. Pemberton it is ordered that Thos. M. O'Connor be associated with the Defense. The Defendant now moves the Court to grant a continuance which said motion is ordered denied. Under direction of the Court the Clerk proceeds with the inpanel-

ment of the Jury and thereupon the following named jurors of the regular panel are regularly drawn and sworn on voir dire, viz: Margaret E. Garcia, E. O. Church, J. O. Wakins, David McCarron, Julia Hyland, Anna Helecker, J. O. Collins, Henry T. Smyth, Nettie Cunningham, Etta Bradshaw, Thos. Wake, and H. A. Thompson and examination of jurors proceeds. Recess ordered until 2 p. m. The Jurors are admonished and excused until said hour. The cause is resumed at 2 p. m. Respective counsel and Defendant present. Upon stipulation that the Jurors are all present the examination of Jurors proceeds. Cause ordered continued to January 28th 1920 at 10 a. m. The Jurors are admonished and excused until the afore-said hour.

(Title of Court and Cause)

January 28th, 1920.

Hon. James G. Quinn, Judge.

The above entitled cause coming on regularly this day for further trial. Comes now into Court Deputy Assistant Attorney John U. Calkins and Myron Harris and the Defendant and her counsel J. E. Peraberton and Thos. M. O'Connor. Upon stipulation that the Jurors are all present the examination of Jurors proceeds and upon examination Nettie Cunningham is excused by the People. Geo. Lovegrove is drawn and sworn on voir-dire and upon examination Henry T. Smyth is excused by the Defense. Lucille Stegman is drawn and sworn on voir-dire and upon examination E. O. Church is excused by the Defense. Geo. D. Moyle is drawn and sworn on [fol. 37] voir dire and upon examination J. O. Watkins is excused by the defense. Frank Meley is drawn and sworn on voir dire and upon examination Julia Hyland is excused by the People. J. P. Sorensen is drawn, sworn on voir dire and upon examination Geo. D. Moyle is excused by the Defense. Ruth L. Rogers is drawn, sworn on voir-dire and upon examination J. P. Sorensen is excused by the Defense. J. W. McClymonds is drawn sworn on voir-dire and a recess is ordered until 2 p. m. The jurors are admonished and excused until said hour. The cause is resumed at 2 p. m. Respective counsel and Defendant present. Upon stipulation that the Jurors are all present the examination proceeds and upon examination Thos. Wake is excused by the People. Joseph Damm is drawn, sworn on voir dire and upon examination David McCarron is excused by the Defense. F. M. Maxfield is drawn, sworn on voir dire and upon examination Geo. Lovegrove is excused by the People. G. F. Calberg is drawn, sworn on voir-dire and upon examination Frank Meley is excused by the Defense. J. W. Watson is drawn, sworn on voir-dire and upon examination G. F. Calberg is excused by the defense. Mrs. W. T. Morton is drawn sworn on voir-dire and upon examination both sides being satisfied the Court directs the Clerk to swear the Jury and thereupon the following Jurors are sworn to try the cause viz: Etta Bradshaw, J. A. Collins, Joseph Damm, Margaret E. Garcia, Anna Helecker, Mr. W. T. Morton, F. M. Maxfield, J. W. McClymonds, Ruth L. Rogers, Lucille Steg-

man, H. A. Thompson and J. W. Watson. And now at this time the Court being of the opinion that the trial will be a protracted one it is therefore ordered that an alternate Juror be drawn and sworn to try the cause and thereupon Mrs. W. E. Haynes is drawn and sworn on voir dire and upon examination both sides being satisfied Mrs. W. E. Haynes is sworn to try the cause as an alternate juror. The Information is read and the plea of the Defendant on each and all of the counts in the Information is stated to the Jury. Deputy District Attorney Myron Harris makes the opening statement of the Prosecution to the Jury. The Defendant now moves the Court to advise the Jury to acquit on the opening statement of the prosecution, which said Motion is by the Court ordered denied. The cause [fol. 38] is by the Court ordered continued to January 29th 1920 at 10 a. m. The Jurors are admonished and excused until said hour and retire in charge of three deputy sheriffs who are sworn to section 1121 of Penal Code.

(Title of Court and Cause)

January 29th, 1920.

The above entitled cause coming on regularly this day for further trial. Comes now into Court Deputy District Attorneys John U. Calkins and Myron Harris and the Defendant with her counsel J. E. Pemberton and Thos. M. O'Connor. Upon stipulation that the Jurors are all present the cause proceeds. Ed. Condon is sworn and examined for the People. The Defendant objects to taking of any testimony in this cause on the ground that the Information does not state a public offense, which said objection is overruled. Peoples exhibit #1 is introduced for identification. Peoples exhibits #2, #3 and #4 are admitted in evidence. Recess ordered for five minutes. Jury admonished and excused and retire in charge of 3 sworn officers. Cause resumed after recess. Respective counsel and defendant present. Upon stipulation that the Jurors are all present the cause proceeds. Ed. Condon is recalled by the People. Peoples exhibit #5 admitted in evidence. Recess ordered until 2 p. m. The Jurors are admonished and excused and retire in charge of 3 sworn officers. Cause resumed at 2 p. m. Respective counsel and defendant present. Upon stipulation the Jurors are all present the cause proceeds. Ed Condon is recalled by the Defendant for cross examination. Max Bedacht and John C. Taylor are sworn and examined for the People. Peoples exhibits #6 and #7 are introduced for identification. Peoples exhibits #7 and #8 admitted in evidence. Jas. H. Dolsen is sworn and examined for the People. Cause ordered continued to January 30, 1920 at 10 a. m. The Jury is admonished and excused and retire in charge of three sworn officers.

(Title of Court and Cause)

January 30, 1920.

The above entitled cause coming on regularly this day for further trial. Comes now into Court Deputy District Attorneys John U. Calkins and Myron Harris and the Defendant with her counsel J. E. [fol. 39] Pemberton and Thos M. O'Connor. Upon stipulation that the Jurors are all present the cause proceeds. Recess ordered for 15 minutes. Jurors admonished and excused and retire in charge of three sworn officers. Cause resumed after recess. Respective counsel and Defendant present. Upon stipulation that the Jurors are all present the cause proceeds. J. H. Dolsen and John C. Taylor are recalled by the People. Peoples exhibits #9 #10 and #1 are admitted in evidence. Recess ordered until 2 p. m. The Jury is admonished and excused until aforesaid hour and retire in charge of three sworn officers. Cause resumed at 2 p. m. Respective counsel and Defendant present. Upon stipulation that the Jurors are all present the cause proceeds. John C. Taylor is recalled by the People. F. G. Thompson, Edric E. Smith, J. G. Wieler, C. Alward Tobey, J. A. Ragsdale, John E. Snyder and Florence Johnson are sworn and examined for the People. The testimony of J. G. Reed is read in evidence to the Jury for the People by stipulation. Recess ordered for five minutes. The Jurors are admonished and excused and retire in charge of three sworn officers. Cause resumed after recess. Respective counsel and Defendant present. Upon stipulation that the Jurors are all present the cause proceeds. The District Attorney resumes the reading of the testimony of J. G. Reed to the Jury. Peoples exhibits #11 and #12 are admitted in evidence. Cause ordered continued to February 2nd 1920 at 10 a. m. The jury is admonished and excused and retire in charge of three sworn officers.

(Title of Court and Cause)

February 2nd, 1920.

Hon. James G. Quinn, Judge.

The above entitled cause coming on regularly this day for further trial. Comes now into Court Deputy District Attorneys John U. Calkins and Myron Harris and the Defendant and her counsel J. E. Pemberton, Esq. Comes now the Jurors. The Jurors are polled and are all present except regular juror Lucile Stegman. Dr. W. A. Clark is sworn and examined by the Court and counsel. It now appearing to the Court that Juror Lucille Stegman is confined to her bed with illness, it is therefore ordered by the Court that the cause [fol. 40] be and the same is hereby continued to February 4, 1920 at 10 a. m. for further trial. The eleven regular Jurors and the alternate Juror are by the Court admonished and excused until said time and retire in charge of five sworn officers.

February 4th, 1920.

James G. Quinn, Judge.

The above entitled cause coming on regularly this day for further trial. Comes now into Court Deputy District Attorneys John U. Calkins and Myron Harris and the Defendant and her counsel J. E. Pemberton, Esq. Comes now the Jurors and by order of Court the Jurors are polled and are all present except regular Juror Lucille Stegman. J. E. Pemberton of counsel for the Defendant moves the Court for a continuance of the case on account of the illness of associate counsel Thos. M. O'Connor which said motion is by the Court ordered denied. J. E. Pemberton of counsel for the Defendant announces that he withdraws from the cause. The Court refuses to allow said J. E. Pemberton to withdraw as counsel for the Defendant and orders the cause to proceed. It now appearing to the court that regular juror Lucille Stegman is unable to attend Court on account of illness, it is therefore ordered that regular juror Lucille Stegman be and she is hereby discharged from further service as a juror in this cause. By order of the Court the name of alternate juror Mrs. W. E. Haynes is placed in the Jury box and by order of the Court the name of alternate Juror Mrs. W. E. Haynes is drawn from the Jury box by the Clerk. It is now ordered by the Court that Mrs. W. E. Haynes be submitted as a regular juror in this cause in place of Lucille Stegman. Recess ordered for 10 minutes. The Jurors are admonished and excused and retire in charge of three sworn officers. Cause resumed after recess. Respective counsel and Defendant present. The Jurors are polled and are all present. F. G. Thompson is recalled for the People. Peoples exhibits #13 to #22 inclusive are introduced for identification. Peoples exhibit #23 admitted in evidence. Recess ordered for five minutes. The Jury is admonished and excused and retire in charge of three sworn officers. [fol. 41] Cause resumed after recess. Respective counsel and Defendant present. Upon stipulation that the Jurors are all present the cause proceeds. W. F. Kyle is recalled by the Defendant for cross examination. Recess ordered until 2 p. m. The jury is admonished and excused and retire in charge of three sworn officers. Cause resumed at 2 p. m. Respective counsel and Defendant present. Upon stipulation that the Jurors are all present the cause proceeds. W. F. Kyle is recalled by the Defense for further cross-examination. Defendants exhibit #1 introduced for identification. Recess ordered for ten minutes. The jury is admonished and excused and retire in charge of three sworn officers. Cause resumed after recess. Respective counsel and Defendant present. Upon stipulation that the Jurors are all present the cause proceeds. Peoples exhibits #20-#15-#16-#19-#21-#18 and #6 are admitted in evidence. Cause ordered continued to February 5, 1920 at 10 a. m. The Jurors are admonished and excused and retire in charge of three sworn officers.

(Title of Court and Cause)

February 5th, 1920.

Hon. James G. Quinn, Judge.

The above entitled cause coming on regularly this day for further trial. Comes now into Court Deputy District Attorneys John U. Calkins and Myron Harris and the Defendant and her counsel J. E. Pemberton, Esq. Upon stipulation that the Jurors are all present, Dr. C. F. Curdts is sworn and examined by the Court and counsel in regard to the health of Juror H. A. Thompson. It appearing to the Court that Juror H. A. Thompson is too ill to sit in the trial of the cause this day it is therefore ordered that the cause be continued to February 6th 1920 at 10 a. m. for further trial. The jurors are admonished and excused and retire in charge of four sworn officers.

(Title of Court and Cause)

February 6, 1920.

Hon. James G. Quinn, Judge.

The above entitled cause coming on regularly this day for further trial. Comes now into Court Deputy District Attorneys John U. Calkins and Myron Harris and the Defendant with her counsel J. E. Pemberton, Esq. The Defendant waives the presence of the Jury in Court. Dr. C. E. Curdts is recalled for further examination as [fol. 42] to the condition of Juror H. A. Thompson.

It appearing to the Court that Jurors H. A. Thompson is unable to appear in Court on account of sickness it is therefore ordered that the Cause be and the same is hereby continued to February 9th 1920 at 10 a. m. for further trial by consent and the Jurors remain in the custody of the four officers heretofore sworn.

(Title of Court and Cause)

February 9th, 1920.

Hon. James G. Quinn, Judge.

The above entitled cause coming on regularly this day for further trial. Comes now into Court Deputy District Attorneys John U. Calkins and Myron Harris and the Defendant with her counsel J. E. Pemberton, Esq. Comes now the Jury and are stipulated to be all present. The cause is by the Court ordered continued to February 10, 1920 at 10 a. m. for further trial. The jurors are admonished and excused and retire in charge of four sworn officers.

(Title of Court and Cause)

February 10, 1920.

Hon. James G. Quinn, Judge.

The above entitled cause coming on regularly this day for further trial. Comes now into Court Deputy District Attorney Myron Harris and the Defendant and her counsel J. E. Pemberton, Esq. Upon stipulation that the Jurors are all present the trial proceeds. Upon motion of J. E. Pemberton it is by the Court ordered that Nathan C. Coghlan be and he is associated with the Defense. F. G. Thompson is recalled for cross examination and passed by the Defense. D. D. Cornwall is sworn and examined for the People. Recess ordered for ten minutes. Jury admonished and excused and retire in charge of three sworn officers. Cause resumed after recess. Respective counsel and Defendant present. Upon stipulation that the Jurors are all present a recess is ordered until 2 p. m. The Jurors are admonished and excused and retire in charge of four sworn officers. Cause resumed at 2 p. m. Respective counsel and Defendant present. Upon stipulation that the Jurors are all present the cause proceeds. Thos. Wood and John Dymond are sworn and examined [foi, 43] for the People. D. D. Cornwall is recalled by the People.

People's exhibits # 24 to #34 inclusive are admitted in evidence. People's exhibit #35 is introduced for identification. Recess ordered for ten minutes. The Jury is admonished and excused and retire in charge of three sworn officers. Cause resumed after recess. Respective counsel and Defendant present. Upon stipulation that the Jurors are all present the cause proceeds. B. M. Johnson, H. Thorwaldson and S. J. Shannon are sworn and examined for the People. People's exhibits #36 and #37 are admitted in evidence. Cause ordered continued to February 11" 1920 at 10 a. m. The Jury is admonished and excused and retire in charge of four sworn officers.

(Title of Court and Cause)

February 11, 1920.

Hon. James G. Quinn, Judge.

The above entitled cause coming on regularly this day for further trial. Comes now into Court Deputy District Attorney Myron Harris and the Defendant and her counsel J. E. Pemberton and Nathan G. Coghlan. Upon stipulation that the Jurors are all present the cause proceeds. Deputy District Attorney Myron Harris reads documentary exhibits in evidence to the Jury. Recess ordered for five minutes. The Jury is admonished and excused and retire in charge of 3 sworn officers. Cause resumed after recess. Respective counsel and Defendant present. Upon stipulation that the Jurors are all present the cause proceeds. Deputy District Attorney Myron Harris resumes reading of evidence to the Jury. Recess ordered until 2 p. m. The jury is admonished and excused and retire in charge of the four sworn officers. The cause is resumed at 2 p. m. Re-

spective counsel and Defendant present. Upon stipulation that the Jurors are all present the trial proceeds. Elbert Coutts is sworn and examined for the People. Recess ordered for five minutes. The Jurors are admonished and excused and retire in charge of three sworn officers. Causes resumed after recess. Respective counsel and Defendant present. Upon stipulation that the Jurors are all present the cause proceeds. Elbert Coutts is recalled by the People. Cause ordered continued to February 13 1920 at 10 a. m. The Jurors are admonished and excused and retire in charge of four sworn officers.

[fol. 44] (Title of Court and Cause)

February 13, 1920

Hon. James G. Quinn, Judge.

The above entitled cause coming on regularly this day for further trial. Comes now into Court Deputy District Attorney Myron Harris and the Defendant and her counsel J. E. Pemberton and Nathan C. Coghlan. Upon stipulation that the Jurors are all present, Deputy District Attorney Myron Harris reads documentary evidence to the Jury. John Dymond is recalled by the People. Recess ordered for five minutes. The Jury is admonished and excused and retire in charge of three sworn officers. Cause resumed after recess. Respective counsel and Defendant present. Upon stipulation that the Jurors are all present the trial proceeds. John Dymond is recalled by the People. Recess ordered until 2 p. m. The Jury is admonished and excused and retire in charge of four sworn officers. Cause resumed at 2 p. m. Respective counsel and Defendant present. Upon stipulation that the Jurors are all present the cause is ordered continued to February 16th 1920 at 10 a. m. for trial. The Jury is admonished and excused and retire in charge of four sworn officers.

(Title of Court and Cause)

February 16, 1920

Hon. James G. Quinn, Judge.

The above entitled cause coming on regularly this day for further trial. Comes now into Court Deputy District Attorneys John U. Calkins and Myron Harris and the Defendant with her counsel J. E. Pemberton and Nathan C. Coghlan. Upon Stipulation that the Jurors are all present the cause proceeds. Elbert Coutts is recalled by the People. Recess ordered Jurors admonished and excused and retire in charge of three sworn officers. Cause resumed after recess. Respective counsel and defendant present. Upon stipulation that the Jurors are all present a recess is ordered until 2 p. m. The Jurors are admonished and excused and retire in charge of three sworn officers. Cause resumed at 2 p. m. Respective counsel and Defendant present. Upon stipulation that the Jurors are all present

the cause proceeds. Elbert Coutts is recalled by the People. Cause [fol. 45] ordered continued to February 17th 1920 at 10 a. m. The Jury is admonished and excused and retire in charge of three sworn officers.

February 17th, 1920.

Hon. James G. Quinn, Judge.

The above entitled cause coming on regularly this day for further trial. Comes now into Court Deputy District Attorneys John U. Calkins and Myron Harris and the Defendant and her counsel J. E. Pemberton and Nathan C. Coghlan. Upon Stipulation that the Jurors are all present the trial proceeds. Elbert Coutts and John Dymond are recalled by the People. Defendant's exhibit #2 is admitted in evidence. Recess ordered for five minutes. The Jury is admonished and excused and retire in charge of 3 sworn officers. Cause resumed after recess. Respective counsel and Defendant present. Upon stipulation that the Jurors are all present the cause proceeds. John Dymond is recalled by the people. Recess ordered until 2 p. m. The Jury is admonished and excused and retire in charge of three sworn officers. Cause resumed at 2 p. m. Respective counsel and Defendant present. Upon stipulation that the Jurors are all present the cause is ordered continued to February 18, 1920 at 10 a. m. for further trial. The Jury is admonished and excused and retire in charge of 3 sworn officers.

(Title of Court and Cause)

February 18, 1920.

Hon. James G. Quinn, Judge.

The above entitled cause coming on regularly this day for further trial. Comes now into Court Deputy District Attorneys John U. Calkins and Myron Harris and the Defendant with her counsel J. E. Pemberton and Nathan C. Coghlan. Upon Stipulation that the Jurors are all present F. W. Kelly is sworn and examined for the People. People's exhibit #38 admitted in evidence and People rest. Max Bedacht is recalled by the Defense for further cross examination. Recess ordered. Jury admonished and excused and retire in charge of 3 sworn officers. Cause resumed after recess. Respective counsel and Defendant present. Upon stipulation that the Jurors are all present the cause proceeds. Max Bedacht is recalled by the Defense for further cross examination. Recess ordered until 2 p. m. [fol. 46] The Jury is admonished and excused and retire in charge of 3 sworn officers. Cause resumed at 2 p. m. Respective counsel and Defendant present. Upon stipulation that the Jurors are all present the trial proceeds. Max Bedacht is recalled by the Defense for further cross examination. Cause ordered continued to February 19th 1920 at 10 a. m. for further trial. The Jurors are admonished and excused until the aforesaid hour and retire in charge of three sworn officers.

The defendant now presents a motion to the Court for the District Attorney to elect what specific act the Defendant is charged with in each and all of the counts of the Information before the Defendant enters upon her defense, and after argument to the Court by respective counsel herein the Motions are submitted to the Court for consideration and decision.

(Title of Court and Cause)

Hon. James G. Quinn, Judge.

February 19, 1920.

The above entitled cause coming on regularly this day for further trial. Comes now into Court Deputy District Attorneys John U. Calkins and Myron Harris and the Defendant and her counsel J. E. Pemberton and Nathan C. Coghlan. Upon Stipulation that the Jurors are all present the cause proceeds. The Motion heretofore made by counsel for Defendant is by the Court ordered denied. Recess ordered for five minutes. The Jury is admonished and excused and retire in charge of 3 sworn officers. The cause is resumed after recess. Respective counsel and Defendant present. Upon stipulation that the Jurors are all present the cause proceeds. Max Bedacht is recalled and examined for the Defendant. Defendant's exhibit #3 admitted in evidence. Charlotte Anita Whitney (the defendant) is sworn and examined for the Defense. Recess ordered for 10 minutes. The Jurors are admonished and excused and retire in charge of three sworn officers. Cause resumed after recess. Respective counsel and Defendant present. Upon stipulation the Jurors are all present the cause proceeds. Charlotte Anita Whitney is recalled by the People for cross examination. Recess ordered until 2 p. m. The Jury is admonished and excused and retire in charge of 3 sworn officers. The cause is resumed [fol. 47] at 2 p. m. Respective counsel and Defendant present. Upon stipulation that the Jurors are all present the cause proceeds. Charlotte Anita Whitney is recalled by the People for further cross examination and the Defense and People rest. Recess ordered for five minutes. The Jury is admonished and excused and retire in charge of 3 sworn officers. Cause resumed after recess. Respective counsel and Defendant present. Upon stipulation that the Jurors are all present the cause proceeds. Deputy District Attorney John U. Calkins presents the opening argument for the Prosecution to the Jury. Cause ordered continued to February 20-1920 at 10 a. m. for further trial. The Jury is admonished and excused and retire in charge of three sworn officers.

(Title of Court and Cause)

February 20, 1920.

Hon. James G. Quinn, Judge.

The above entitled cause coming on regularly this day for further trial. Comes now into Court Deputy District Attorneys John U.

Calkins and Myron Harris and the Defendant and her counsel J. E. Pemberton and Nathan C. Coghlan. Upon Stipulation that the Jurors are all present the cause proceeds. Nathan C. Coghlan of counsel for the Defendant presents argument to the Jury on behalf of the Defendant. Recess ordered for five minutes the Jury is admonished and excused and retire in charge of 3 sworn officers. Cause resumed after recess. Respective counsel and Defendant present. Upon stipulation that the Jurors are all present the cause proceeds.

Nathan C. Coghlan resumes his argument to the Jury. Recess ordered until 2 p. m. The Jury is admonished and excused and retire in charge of 3 sworn officers. Cause resumed at 2 p. m. Respective counsel and Defendant present. Upon stipulation that the Jurors are all present the cause proceeds. Deputy District Attorney Myron Harris presents the closing argument for the Prosecution to the Jury. Recess ordered for five minutes. The Jury is excused and retire in charge of 3 sworn officers. Cause resumed after recess. Respective counsel and Defendant present. Upon stipulation that the Jurors are all present Deputy District Attorney Myron Harris resumes his argument to the Jury. In pursuance to stipulation of [fol. 48] counsel the Court orally instructs the Jury as to the law and the Jury retire to deliberate in charge of four sworn officers at 4.50 p. m. Comes now the Jury at 9.30 p. m. Respective counsel and Defendant present. Upon stipulation of counsel that the Jurors are all present the Jury inform the Court that they are unable to agree upon a verdict upon certain counts in the Information. Thereupon the Court gives the Jury further instructions and the Jury retire for further deliberation in charge of the sworn officers. Comes now the Jury at 10.40 p. m. are stipulated all present. Respective counsel and Defendant present. The Jury inform the Court that they have agreed upon a verdict as to a certain count in the Information, but that they cannot agree upon other counts. Thereupon the Court questions each and all of the Jurors separately as to their probability of arriving at a verdict upon other counts and it appearing to the Court that the Jury are unable to agree upon a verdict upon certain counts the Court directs the foreman to read the verdict of the jury agreed upon and thereupon the foreman reads the following verdict, viz:

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE
COUNTY OF ALAMEDA

[Title omitted]

VERDICT OF JURY

We the Jury in the above entitled cause find the Defendant Guilty of felony as charged in the Information as to Count One and Not Guilty as to Counts—.

Mrs. W. E. Haynes, Foreman.

The foreman of the Jury now orally announces to the Court that the Jury are unable to agree upon a verdict as to counts Two-Three-Four and Five charged in the Information. Under direction of the Court the verdict is recorded by the Clerk and read to the Jury as recorded and by the Jury affirmed as read and recorded. At request of Defendant the Jury is polled and each and all of the Jurors separately affirm the verdict as his verdict as recorded and read. [fol. 49] Thereupon the jury is by the Court ordered discharged from further service. Sentence upon the First Count of the Information is by the Court ordered continued to February 24-1920 at 10 a. m. Counts Two-Three-Four and Five are by the Court ordered continued to February 24-1920 at 10 a. m. to be set for trial. The Defendant now moves the Court to be allowed to remain on bail which said Motion is by the Court ordered denied and the Defendant is ordered into the custody of the Sheriff of the County of Alameda.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE
COUNTY OF ALAMEDA

[Title omitted]

Tuesday February 24th, 1920.

James G. Quinn, Judge. L. A. Rudolph, Clerk. W. T. McSorley,
Official Reporter.

The above entitled cause coming on regularly this day for sentence on Count Number One of the Information and to be set as to Counts Number Two-Three-Four and Five of the Information herein. Comes now into Court Deputy District Attorneys John U. Calkins and Myron Harris and Defendant and her counsel J. E. Pemberton and Nathan C. Coghlan. The Defendant now moves the Court to dismiss the cause on the ground that the Jury rendered an incomplete and invalid verdict. The matter is submitted and passed to 2 p. m. for decision. Cause resumed at 2 p. m. Respective counsel and Defendant present. The motion to dismiss is by the Court ordered denied. Upon motion of Deputy District Attorney John U. Calkins it is by the Court ordered that counts number two-three-four and five of the Information be and the same are hereby dismissed. The Defendant now submits an oral motion for a new trial upon all of the statutory grounds which said Motion is by the Court ordered denied. The Defendant now submits a motion in arrest of Judgment, which [fol. 50] said motion is by the Court ordered denied and thereupon the defendant was duly informed of the information filed against her on December 30th, 1919, for the crime of Felony, to wit: a violation of an act entitled "An Act defining criminal syndicalism and sabotage; proscribing certain acts and methods in connection therewith and in pursuance thereof and providing penalties and punishments therefor, approved April 30" 1919" in five counts committed on the 28" day of November, 1919, and of *his* arraignment and plea of "Not Guilty"

to the said information; on each and all of said counts in said Information, of *his* trial and the verdict of "Guilty" of felony as charged in the Information as to count One rendered by the Jury on February 20th 1920 of her motion for a new trial; of her motion for a New trial being denied; of her motion in arrest of judgment; of her motion in arrest of Judgment being denied.

The defendant was then asked whether she had any legal cause to show why judgment should not be pronounced against her and Defendant interposed aforesaid motions for a new trial and Motion in arrest of Judgment which were by the Court denied.

The defendant was then asked whether she had any legal cause to show why judgment should not be pronounced against her and Defendant interposed aforesaid Motions for a new trial and Motion in arrest of Judgment which were by the Court denied.

No sufficient cause being alleged or appearing to the Court why judgment should not be pronounced, the Court thereupon rendered judgment and ordered and adjudged that whereas Charlotte A. Whitney had been duly convicted in this Court of the crime of Felony, to-wit: A violation of an act entitled "An Act defining criminal syndicalism and sabotage, proscribing certain Acts and methods in connection therewith and in pursuance thereof and providing penalties and punishments therefore, approved April 30th, 1919 -he therefore be confined in the state prison of the State of California in accordance with an act entitled "An Act defining criminal syndicalism and sabotage, proscribing certain acts and methods in connection therewith and in pursuance thereof and providing penalties and punishments therefor approved April 30, 1919 [fol. 51] and designated further chapter 188 of the statutes of California and amendments to the Code of California of 1919 and Section 1168 of the Penal Code, and that she be remanded to the custody of the Sheriff of the County of Alameda and be by him taken and delivered to the Warden of the state prison of the State of California at San Quentin.

Comes now the Defendant and Appeals from the Judgment of the Court rendered herein and from the Order of the Court denying the Defendant's Motion for a New Trial to the District Court of Appeal of the State of California in and for the First Appellate District thereof.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE
COUNTY OF ALAMEDA

[Title omitted]

VERDICT OF JURY—Filed Feb. 20, 1920

We, the jury in the above entitled cause, find the defendant guilty of felony as charged in the information as to counts One and not guilty as to counts —.

Mrs. W. E. Haynes, Foreman.

[File endorsement omitted.]

REQUESTED INSTRUCTIONS

The Court instructs the Jury that if after a consideration all the evidence in this case you find that the evidence is susceptible of two opposite interpretations or explanations, the one of which is consistent with the guilt of the defendant, the other of which is consistent with the innocence of the defendant—it is your plain duty to vote not guilty.

Respectfully submitted N. C. Coghlan, Attorney for Defendant.

Given at request of deft. Quinn, J.

The jury has nothing to do with the matter either of sentence or probation of the defendant, and therefore, they have no right in their deliberations to even consider much less to discuss such matter.

The sole question before you is that of guilt or innocence of the defendant. If you are in reasonable doubt as to this she should be acquitted.

Respectfully submitted, N. C. Coghlan, Attorney for Defendant.

Given at request of deft. Quinn, J.

The Court advises the jury to bring in a verdict of "Not Guilty" on each and every Count in the Information.

Refused. Quinn, J.

The Court advises the Jury to bring in the following verdict on each and every Count in the Information:

"Not Guilty by reason of variance between Information and proof."

Refused. Quinn, J.

You must not convict defendant under any Count of the Information unless each and all the facts necessary to constitute the particular offense charged in that particular count have been fully proved to your satisfaction beyond all reasonable doubt.

Given. Quinn, J.

I charge you that the use of sabotage as a means for inducing a governor to pardon prisoners is not forbidden at all by the law under which this prosecution is brought; neither is any advocacy, or justification of such use for such purpose, however wrong such action [fol. 53] or the justification or advocacy thereof may be, or how far punishable under other laws, neither can be punished under the action here brought, and which you are now called upon to try.

Refused. Quinn J.

The law under which this charge is brought does not forbid any kind of action being used or advocated as a means of securing the release of persons from prison. Not even the use or advocacy of force, sabotage or any other crime as a means of procuring such re-

lease from prison can be prosecuted under this law or punished in this proceeding.

Refused. Quinn J.

You must be careful to try this case solely upon the evidence placed before you at the trial; and not in any particular whatever must you consider anything you may have read in any newspaper or newspapers before the trial began.

Given. Quinn J.

No opinions you may have gained from reading newspapers prior to this trial as to the character either [of Eugene Debs of the Socialist Party]* of the Communist Labor party of the Soviet Government of Russia, or any other person or organization mentioned in the evidence, must be allowed to weigh in any degree with you in arriving at a verdict. You must judge of their character so far as it has anything to do with this case solely by the evidence introduced here; and it is your duty (for the purposes of this trial) to consider such character to be good unless the contrary is proved beyond all reasonable doubt.

Given as modified. Quinn, J.

Before the jury brings in a verdict of guilty in any criminal case each individual juror should be in his or her own mind convinced beyond all reasonable doubt of the truth of the charge. No juror should recede from his or her own honest opinion on the question of whether guilt has been proved beyond reasonable doubt merely because other jurors are of a different opinion. So long as one juror is honestly of opinion that the Defendant's guilt has not been proved beyond all reasonable doubt, it is his or her duty under the law, and [fol. 54] under the oath administered to the jurors, to vote "Not Guilty," no matter how many other jurors are of different opinion.

Covered. Quinn, J.

I instruct you that before a jury should bring in a verdict of guilty each member must agree with every other member that some specifically charged act which constitutes the crime set out in the particular count being considered has been committed by the defendant; and all twelve must agree upon the same specific act. It will not do for purpose of arriving at a verdict of "Guilty" that some of the jurors are convinced of a defendant having committed a certain act which they think constitutes the crime, while other jurors are only convinced that another such act was committed for each of the twelve should be convinced beyond all reasonable doubt of the commission of the same particular specific act or series of acts necessary to constitute the complete crime charged in the particular count being passed upon, or a verdict of guilty should not be rendered thereon.

Given. Quinn, J.

[*Words enclosed in brackets erased in copy.]

I charge you that in this case to constitute any crime there must exist a union or joint operation of act and intent.

Covered. Quinn, J.

I charge you that you must not convict in this case unless convinced beyond all reasonable doubt that defendant had [a criminal]* intent of doing an act forbidden by the law under which this prosecution is brought.

Given as modified. Quinn, J.

One of the charges brought against this defendant is that she knowingly became a member of an organization organized to advocate criminal syndicalism. Before she [should]* can be convicted of this charge every member of the jury must be convinced beyond all reasonable doubt not only that the organization in question was organized for such criminal purpose, but also that the defendant knew that it was so organized for such criminal purpose or that she remained a member after knowing its unlawful purpose.

Given as modified. Quinn, J.

Endorsed: Filed Feby. 20, 1920. Geo. E. Gross, County Clerk, by L. A. Rudolph, Deputy Clerk.

[fol. 55] There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct or positive testimony of an eye witness to the commission of the crime, and the other is proof in testimony of a chain or circumstances pointing sufficiently strong to the commission of the crime by the defendant, and which is known as circumstantial evidence. Such evidence may consist of statements by defendant, plans laid for the commission of the crime, in short, any acts, declarations, or circumstances admitted in evidence tending to connect the defendant with the commission of the crime. There is nothing in the nature of circumstantial evidence that renders it less reliable than the other class of evidence.

People's Instruction. Given. Quinn, J.

If, upon consideration of the whole case you are satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the defendant, you should so find, irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence. The law makes no distinction between circumstantial and direct evidence in the degree of proof required for conviction, but only requires that the jury shall be satisfied beyond a reasonable doubt by evidence of either the one character or the other, or both.

People's Instruction. Given. Quinn, J.

That the information and charge against the defendant may be fresh in your mind I will read those portions of the various counts

[*Words enclosed in brackets erased in copy.]

of the same in so far as material to these instructions. The charging part of the First Count reads as follows:

"* * * Charlotte A. Whitney is accused by the District Attorney of the said County of Alameda, by this information of the crime of felony, to wit: a violation of an Act entitled "An Act defining criminal syndicalism and sabotage, proscribing certain acts and methods in connection therewith, and in pursuance thereof, and providing penalties and punishments therefor," approved April 30th, 1919, committed as follows: The said Charlotte A. Whitney prior to the time of filing this information, and on or about the 28th day of November, A. D. nineteen hundred and nineteen, at the said County [fol. 56] of Alameda, State of California, did then and there unlawfully, wilfully, wrongfully, deliberately and feloniously organize and assist in organizing, and was, is, and knowingly became a member of an organization, society group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism."

If you are satisfied to and beyond all reasonable doubt that the said Charlotte A. Whitney, on or about the time alleged in the information and prior to its filing in the County of Alameda, did organize or assist in organizing, or knowingly was or knowingly became a member of any organization or society or group of assemblage of persons organized or assembled to advocate or teach or aid and abet criminal syndicalism, as that term has been defined in the statute just read to you, it is your duty to find the defendant guilty.

People's Instruction. Given. Quinn.

I will now read the Second Count of the Information, the charging part of which reads as follows:

"And the said Charlotte A. Whitney is accused by the District Attorney of said County of Alameda by this information of the crime of felony, to-wit: a violation of an Act entitled "An Act defining criminal syndicalism and sabotage, proscribing certain acts and methods in connection therewith, and in pursuance thereof, and providing penalties and punishments therefor," approved April 30th, 1919, committed as follows: The said Charlotte A. Whitney, prior to the time of filing this information, and on or about the 28th day of November, A. D. nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlawfully, wilfully, wrongfully, deliberately and feloniously print, publish, edit, issue, circulate and publicly display books, papers, pamphlets, documents, posters and written and printed matter containing and carrying written and printed advocacy, teaching and aid and abetment of, and advising criminal syndicalism."

If you are satisfied to and beyond all reasonable doubt that the said Charlotte A. Whitney, on or about the time alleged in the information and prior to its filing, in the County of Alameda, did either print or publish, or edit or issue or circulate or publicly display [fol. 57] either books or papers or pamphlets or documents or posters or written or printed matter containing or carrying written or printed

advocacy, teaching, or aid and abetment of, and advising criminal syndicalism as that term has been defined in the statute just read, then in such case, it is your duty to find the defendant guilty of such count.

People's Instruction. Given. Quinn, J.

I will now read you the charging part of the Third Count:

"And the said Charlotte A. Whitney is accused by the District Attorney of said County of Alameda by this information of the crime of felony, to-wit: a violation of an Act entitled "An Act defining criminal syndicalism and sabotage, proscribing certain acts and methods in connection therewith, and in pursuance thereof and providing penalties and punishments therefor," approved April 30th, 1919, committed as follows: The said Charlotte A. Whitney prior to the time of filing this information, and on or about the 28th day of November A. D. nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlawfully, willfully, deliberately and feloniously by spoken and written words, and by personal conduct advocate, teach, aid and abet criminal syndicalism, and the duty, necessity, and propriety of committing crime, sabotage, violence, and unlawful methods of terrorism as a means of accomplishing a change in industrial ownership and control, and as a means of effecting a political change."

The court instructs you that if you find, to and beyond all reasonable doubt, that the defendant did, on or about the time alleged in the information and prior to the filing thereof in the County of Alameda, by spoken or written words, or by personal conduct either advocate or teach or aid and abet criminal syndicalism or the duty or necessity or propriety of committing crime or sabotage or violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or as a means of effecting a political change, then in such event, it will be your duty to find the defendant guilty on the said Third Count.

[fol. 58] People's Instruction. Given. Quinn, J.

I will now call your attention to the Fourth Count of the Information, the charging part of which reads as follows:

"And the said Charlotte A. Whitney is accused by the District Attorney of said County of Alameda by this information of the crime of felony, to-wit, a violation of an Act entitled "An Act defining criminal syndicalism and sabotage, proscribing certain acts and methods in connection therewith, and in pursuance thereof and providing penalties and punishments therefor," approved April 30th, 1919, committed as follows: The said Charlotte A. Whitney prior to the time of filing this information, and on or about the 28th day of November, A. D. nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlawfully, willfully, wrongfully, deliberately and feloniously, by spoken and written words, justify and attempt to justify criminal syndicalism and the commission and attempt to commit crime, sabotage, violence, and

unlawful methods of terrorism with intent then and there to approve, advocate and further the doctrine of criminal syndicalism."

If you are satisfied to and beyond all reasonable doubt that the said Charlotte A. Whitney, on or about the time alleged in the information and prior to its filing in the County of Alameda did then and there, by either spoken or written words, justify or attempt to justify criminal syndicalism as that term has been defined in the statute read to you, or the commission or attempt to commit crime or sabotage or violence or unlawful methods of terrorism with intent then and there to approve or advocate or further the doctrine of criminal syndicalism, then, in such case, you should find the defendant guilty of such fourth count.

People's Instruction. Given. Quinn, J.

The Court now directs your attention to the Fifth Count of the information, the charging part of which reads as follows:

"And the said Charlotte A. Whitney is accused by the District Attorney of said County of Alameda by this information of the crime of felony, to-wit: a violation of an Act entitled "An Act defining [fol. 59] criminal syndicalism and sabotage, proscribing certain acts and methods in connection therewith, and in pursuance thereof and providing penalties and punishments therefor" approved April 30th 1919, committed as follows, to-wit: The said Charlotte A. Whitney prior to the time of filing this information, and on or about the 28th day of November, A. D. nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlawfully, wrongfully, willfully, deliberately and feloniously by personal acts and conduct practice and commit acts, advised, advocated, taught and aided and abetted by the doctrine and precept of criminal syndicalism, with intent to accomplish a change in industrial ownership and control and affecting a political change."

The Court instructs you that if you find from the evidence to and beyond all reasonable doubt, that this defendant, on or about the time alleged in the information and prior to the filing thereof, at the said County of Alameda, did either by personal acts or conduct practice or commit any acts, advised or advocated, or taught or aided and abetted by the doctrine or precept of criminal syndicalism with intent to accomplish a change in industrial ownership or control or effecting a political change, it is your duty, in the event of so finding, to find the defendant guilty on such Fifth Count.

People's Instruction. Given. Quinn, J.

Evidence has been admitted in the case of statements, acts and declarations of persons other than the defendant, and not made and done in the presence of the defendant, and of printed matter purporting to be printed matter of the I. W. W. and of the Communist Labor Party, or circulated or publicly displayed by the I. W. W. and by the Communist Labor Party, and taken from places and at times at which the defendant was not present, and which was not directly connected with the defendant, and which the evidence does

not show was circulated, printed, or publicly displayed with her acquiescence or consent. Evidence has also been admitted of other objects which are not directly connected with the defendant.

The court instructs you that such evidence was admitted for but one purpose, and is to be considered by you for that one purpose [fol. 60] only, and that is to determine the character of the organization of which it is claimed the defendant was a member, or which it is claimed she organized or assisted in organizing, namely, whether or not it was an organization, society, group or assemblage of persons organized or assembled to advocate, teach, or aid and abet criminal syndicalism, as defined in the statute from which I have to you.

People's Instruction. Given. Quinn, J.

All pamphlets, printed matter, and other exhibits in evidence in this case, which you determine from the evidence to be printed, circulated, or publicly displayed with her knowledge, acquiescence and consent, you will consider for all persons material to this case.

People's Instruction. Given. Quinn, J.

The Court further instructs you that it is not incumbent upon the prosecution to prove the exact date upon which the crime was committed, if any crime was committed by the defendant, but it is sufficient to prove that the acts constituting the crime were committed at or prior to the time alleged in the information and subsequent to the 30th day of April, 1919.

People's Instruction. Given. Quinn, J.

Endorsed: Filed Feby. 20, 1920. Geo. E. Gross, County Clerk,
By L. A. Rudolph, Deputy Clerk.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF ALAMEDA

Before Hon. James G. Quinn, Judge, and Jury

[Title omitted]

CHARGE TO THE JURY—Filed Feb. 28, 1920

Oakland, California, Friday, February 20, 1920.

The Court: People against Whitney. Will counsel stipulate that the jurors are all present?

[fol. 61] Mr. Harris: So stipulated, your Honor.

Mr. Coghlan: Yes, your Honor.

The Court: Will counsel further stipulate that the Court may orally instruct the jury, the said instructions given by the Court to be taken down in shorthand by the shorthand reporter, and hereafter transcribed if found necessary?

Mr. Harris: Yes, your Honor.

Mr. Coghlan: Yes, your Honor.

Mr. Pemberton. Of course, it is understood that the verbal instructions are not withdrawn, those instructions that we have requested are still requested.

The Court: Oh, certainly; they are still requested. I understand.

Ladies and gentlemen of the jury, it now becomes the duty of the Court to give you instructions upon questions of law which should govern you in reaching your conclusions upon the evidence which is presented to you in this case. The jury are the exclusive judges of all questions of fact. You are also the sole judges of the weight of the evidence, and the credibility of witnesses, but as to the principles of law involved you are to be governed by the instructions of the Court.

Your power of judging of the effect of the evidence is not arbitrary, and is to be exercised with legal discretion and in subordination to the rules of evidence.

At the outset, I charge the jury that you must not consider for any purpose any testimony or evidence which has, by order of the Court, been stricken out. Such testimony or evidence should be treated by you as though you had never heard or seen it.

You will distinctly understand that in this charge the Court in no manner or form is expressing, or desires to express, any opinion on the weight of the evidence, or any part thereof, nor does the Court express any opinion as to the truth or falsity of the testimony of any witness; not does the Court in any manner or form express its opinion that any alleged fact in this case is or is not proven. With questions of fact, the weight of evidence, the credit that you [fol. 62] should give to any witness sworn in the case, the Court has nothing to do. They are matters entirely within your province, and which you, as jurors, under your oaths, must determine for yourselves.

The duty of the Court, as before stated, is simply to announce to you such general principles of law as are applicable to the case, based upon the testimony that you have heard, in as concise a manner as is consistent with its duties and in the importance of the issues involved.

If, in stating to you any propositions of law, I have assumed any fact as proven, you are to disregard such assumption and deduce your own conclusions from the evidence; that is to say, you, and you alone, are the exclusive judges of the facts of the case.

If the judge of this Court has at any time during this trial used any language, or has seemed to you to indicate the opinion of the judge as to any question of fact, or as to the credibility of any witness, you must not be influenced thereby, but must determine, yourselves, all questions of fact without regard to the opinion of anyone else.

It was your duty to listen patiently to all evidence in this case, and to the arguments of counsel. While it was your duty to listen to and consider the arguments of counsel, I instruct you that such arguments are not evidence; that the only legitimate purpose of argument is to assist you in arriving at a proper verdict from the

evidence in the case, applying to such evidence, the law as given to you by the Court.

You are not bound to decide in conformity with the declarations of only — number of witnesses which do not produce conviction in your minds against a less number or against a presumption which satisfies your minds.

The direct evidence of one witness who is entitled to full credit is sufficient for the proof of any fact except perjury and treason.

A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, the [fol. 63] character of his testimony, or by evidence affecting his character for truth, honesty, and integrity, or his motives, or by contradictory evidence, and the jury are the exclusive judges of the credibility of all witnesses in this case.

You are also the exclusive judges of all questions of fact. If any witness in this case has wilfully testified falsely as to any material matter, such witness is to be distrusted in the other portions of his or her testimony, and you are at liberty to disregard from your consideration all of the testimony of such witness which has not been shown by other evidence to be, or which you do not believe to be true.

I do not intimate to you that any witness in this case has testified falsely, or that any witness has been impeached in this case. These are matters exclusively within your province as jurors, and not to be determined by the Court.

Every person charged with a crime is presumed to be innocent until proven guilty beyond a reasonable doubt. This presumption is a thing of substance and continues with the defendant throughout the trial, and until the evidence convinces you beyond a reasonable doubt of her guilt as charged.

The law raises no presumption whatever against the defendant, but on the contrary, every presumption of law is in favor of her innocence, and, in order to convict her of any crime charged in the information, every material fact necessary to constitute such crime must have been proved to your satisfaction and beyond all reasonable doubt.

I instruct you that before you can find the defendant guilty you must find that the evidence is not only consistent with her guilt, but you must further find that it is inconsistent with any other reasonable conclusion to be drawn therefore.

(The following instruction was given at the request of the defendant.)

The Court instructs the jury that if, after considering all the evidence in this case you find that the evidence is susceptible of two opposite interpretations or explanations—the one of which is consistent with the guilt of the defendant, the other of which is consistent with the innocence of the defendant—it is your plain duty to vote not guilty.

It is not sufficient in this case that there may be a suspicion or

probability of the defendant's guilt, nor can her guilt be arrived at by surmise, conjecture, or compromise, on the part of the jury.

By reasonable doubt is not meant every mere possible or imaginary doubt, because all things pertaining to human affairs may be open to some mere possible or imaginary doubt, but it had been defined to be that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

The law does not require demonstration, however, that is, such a degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind.

A crime or public offense is an act committed or omitted in violation of law forbidding or commanding it, and to which is annexed upon conviction certain punishment.

Defendant's instruction.

I charge you that you must not convict in this case unless convinced beyond all reasonable doubt that defendant had an intent of doing an act forbidden by the law under which this prosecution is brought.

In every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence. The intent or intention is manifested by the circumstances connected with the offense and the sound mind and discretion of the accused.

All persons are of sound mind who are neither idiots nor lunatics nor affected with insanity.

It is a presumption of law that an unlawful act is done with an unlawful intent.

A malicious and guilty intent is always presumed from the deliberate commission of an unlawful act for the purpose of injuring another.

[fol. C5] While it is true that the law presumes that every man intends the natural consequences of his acts knowingly and deliberately committed, in a case like this, the presumption is not conclusive but is probative in character. It is for the consideration of the jury in connection with all the other evidence in this case, to the end that you may determine the real intent of the party in doing what you may find she did do. You may infer the intent from the character, and the natural, ordinary, necessary consequences of the acts done. The defendant's intent is to be determined from all the evidence. You are not to be influenced except by the evidence. You must not be influenced by outside opinion or by newspaper reports, or by any real or fancied public opinion against the defendant.

Defendant's Instruction.

You must be careful to try this case solely upon the evidence placed before you at the trial; and not in any particular whatever must you consider anything you may have read in any newspaper or newspapers before the trial began.

The defendant is entitled to a fair, just and impartial trial and

you can convict her only upon being satisfied from the evidence of her guilt beyond a reasonable doubt.

In arriving at the intent with which an act is committed, it is, of course, impossible to look into the mind of a person and see what its workings are. We cannot bring a photograph of the human mind and exhibit it to you so as to demonstrate clearly and absolutely what the workings of a human being's mind are; hence, of necessity, the law says you shall gather the intention with which an act is done from all of the circumstances surrounding its commission.

If you find that the crime charged has been committed, and the defendant is guilty, you should so adjudge, and let the consequences be what they may.

The jury has nothing to do with the matter either of sentence or probation of the defendant, and therefore, they have no right in their deliberations to even consider, much less to discuss such matter. The sole question before you is that of guilt or innocence of the defendant. [fol. 66] If you are in reasonable doubt as to this she should be acquitted.

There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct or positive testimony of an eye witness to the commission of the crime, and the other is proof in testimony of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant, and which is known as circumstantial evidence. Such evidence may consist of statements by defendant, plans laid for the commission of the crime, in short, any acts, declarations, or circumstances admitted in evidence tending to connect the defendant with the commission of the crime. There is nothing in the nature of circumstantial evidence that renders it less reliable than the other class of evidence.

If, upon consideration of the whole case, you are satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the defendant, you should so find, irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence. The law makes no distinction between circumstantial and direct evidence in the degree of proof required for conviction, but only requires that the jury shall be satisfied beyond a reasonable doubt by evidence of either the one character or the other, or both.

The act under which the defendant is prosecuted, in denouncing certain acts as a crime, uses, insofar as is material to this prosecution, the following language:

"The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change." "Any person who:

1. By spoken or written words or personal conduct advocates, teaches or aids and abets criminal syndicalism or the duty, necessity or propriety of committing crime, sabotage, violence, or any unlawful method of terrorism as a means of accomplishing a change [fol. 67] in industrial ownership or control, or effecting any political change; or

2. Willfully and deliberately by spoken or written words justifies or attempts to justify criminal syndicalism or the commission or attempt to commit crime, sabotage, violence or unlawful methods of terrorism with intent to approve, advocate or further the doctrine of criminal syndicalism; or

3. Prints, publishes, edits, issues or circulates or publicly displays any book, paper, pamphlet, document, poster or written or printed matter in any other form, containing or carrying written or printed advocacy, teaching, or aid and abetment of, or advising, criminal syndicalism; or

4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism; or

5. Willfully by personal act or conduct, practices or commits any act advised, advocated, taught or aided and abetted by the doctrine or precept of criminal syndicalism, with intent to accomplish a change in industrial ownership or control, or effecting any political change;

Is guilty of a felony, and punishable as therein described."

That the information and charge against the defendant may be fresh in your mind I will read those portions of the various counts of the same insofar as material to these instructions. The charging part of the First Count reads as follows:

"* * * Charlotte A. Whitney is accused by the District Attorney of the said County of Alameda, by this information of the crime of felony, to-wit: a violation of an Act entitled 'An Act defining criminal syndicalism and sabotage, proscribing certain acts and methods in connection therewith, and in pursuance thereof, and providing penalties and punishments therefor,' approved April 30th, 1919, committed as follows: The said Charlotte A. Whitney prior to the time of filing this information, and on or about the 28th day of November, A. D. nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlaw- [fol. 68] fully, willfully, wrongfully, deliberately and feloniously organize and assist in organizing, and was, is, and knowingly became a member of an organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism."

If you are satisfied to and beyond all reasonable doubt that the said Charlotte A. Whitney, on or about the time alleged in the information, and prior to its filing in the County of Alameda, did organize or assist in organizing, or knowingly was or knowingly became a member of any organization or society or group or assemblage of persons organized or assembled to advocate or teach or aid and abet criminal syndicalism, as that term has been defined in the statute just read to you, it is your duty to find the defendant guilty.

I will now read the second count of the information, the charging part of which reads as follows:

"And the said Charlotte A. Whitney is accused by the District Attorney of said County of Alameda by this information of the crime of felony, to-wit: a violation of an Act entitled 'An Act defining criminal syndicalism and sabotage, proscribing certain acts and methods in connection therewith, and in pursuance thereof, and providing penalties and punishments therefor,' approved April 30th, 1919, committed as follows: The said Charlotte A. Whitney, prior to the time of filing this information, and on or about the 28th day of November, A. D. nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlawfully, willfully, wrongfully, deliberately and feloniously print, publish, edit, issue, circulate and publicly display books, papers, pamphlets, documents, posters and written and printed matter containing and carrying written and printed advocacy, teaching and aid and abetment of, and advising, criminal syndicalism."

If you are satisfied to and beyond all reasonable doubt that the said Charlotte A. Whitney, on or about the time alleged in the information and prior to its filing, in the County of Alameda, did either print or publish, or edit or issue or circulate or publicly display either books or papers or pamphlets or documents or posters or written or printed matter containing or carrying written or printed [fol. 69] advocacy, teaching, or aid and abetment of, and advising criminal syndicalism, as that term has been defined in the statute just read, then in such case, it is your duty to find the defendant guilty on such count.

I will now read you the charging part of the Third Count:

"And the said Charlotte A. Whitney is accused by the District Attorney of said County of Alameda by this information of the crime of felony, to-wit: a violation of an Act entitled 'An Act defining criminal syndicalism and sabotage proscribing certain acts and methods in connection therewith, and in pursuance thereof and providing penalties and punishments therefor,' approved April 30th, 1919 committed as follows: The said Charlotte A. Whitney prior to the time of filing this information, and on or about the 28th day of November, A. D. nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlawfully, willfully, deliberately and feloniously by spoken and written words, and by personal conduct advocate, teach, aid and abet crimi-

nal syndicalism, and the duty, necessity, and propriety of committing crime, sabotage, violence, and unlawful methods of terrorism as a means of accomplishing a change in industrial ownership and control and as a means of effecting a political change;"

The Court instructs you that if you find, to and beyond all reasonable doubt, that the defendant did, on or about the time alleged in the information and prior to the filing thereof in the County of Alameda, by spoken or written words, or by personal conduct either advocate or teach or aid and abet criminal syndicalism or the duty or necessity or propriety of committing crime or sabotage or violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or as a means of effecting a political change, then in such event, it will be your duty to find the defendant guilty on the said Third Count.

I will now call your attention to the Fourth Count of the information, the charging part of which reads as follows:

"And the said Charlotte A. Whitney is accused by the District Attorney of the said County of Alameda by this information of the [fol. 70] crime of felony, to-wit: a violation of an Act entitled 'An Act defining criminal syndicalism and sabotage, proscribing certain acts and methods in connection therewith, and in pursuance thereof and providing penalties and punishments therefor,' approved April 30th, 1919, committed as follows: The said Charlotte A. Whitney prior to the time of filing this information, and on or about the 28th day of November, A. D. nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlawfully, willfully, wrongfully, deliberately and feloniously, by spoken and written words, justify and attempt to justify criminal syndicalism and the commission and attempt to commit crime, sabotage, violence, and unlawful methods of terrorism with intent then and there to approve, advocate and further the doctrine of criminal syndicalism;"

If you are satisfied to and beyond all reasonable doubt that the said Charlotte A. Whitney, on or about the time alleged in the information and prior to its filing in the County of Alameda did then and there, by either spoken or written words, justify or attempt to justify criminal syndicalism as that term has been defined in that statute read to you, or the commission or attempt to commit crime or sabotage or violence or unlawful methods of terrorism with intent then and there to approve or advocate or further the doctrine of criminal syndicalism, then, in such case, you should find the defendant guilty of such Fourth Count.

The Court now directs your attention to the Fifth Count of the information, the charging part of which reads as follows:

"And the said Charlotte A. Whitney is accused by the District Attorney of said County of Alameda by this Information of the crime of felony, to-wit: a violation of an Act entitled, 'An Act defining criminal syndicalism and sabotage, proscribing certain acts

and methods in connection therewith, and in pursuance thereof and providing penalties and punishments therefor, approved April 30th, 1919, committed as follows, to-wit: The said Charlotte A. Whitney prior to the time of filing this information, and on or about the 28th day of November, A. D. nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there [fol. 71] unlawfully, wrongfully, willfully, deliberately and feloniously by personal acts and conduct practice and commit acts, advised, advocated, taught and aided and abetted by the doctrine and precept of criminal syndicalism, with intent to accomplish a change in industrial ownership and control and effecting a political change."

The Court instructs you that if you find from the evidence to and beyond all reasonable doubt, that this defendant, on or about the time alleged in the information, and prior to the filing thereof, at the said County of Alameda, did either by personal acts or conduct practice or commit any acts, advised or advocated, or taught or aided and abetted by the doctrine or precept of criminal syndicalism, with intent to accomplish a change in industrial ownership or control or affecting a political change, it is your duty, in the event of so finding, to find the defendant guilty on such Fifth Count. Defendant's Instruction.

You must not convict defendant under any count of the information unless each and all the facts necessary to constitute the particular offense charged in that particular count have been fully proved to your satisfaction beyond all reasonable doubt.

I instruct you that before a jury should bring in a verdict of guilty, each member of the jury must agree with every other member that some specifically charged act which constitutes the crime set out in the particular count being considered has been committed by the defendant; and all twelve must agree upon the same specific act. It will not do for the purpose of arriving at a verdict of "Guilty" that some of the jurors are convinced of a defendant having committed a certain act which they think constitutes a crime, while other jurors are only convinced that another such act was committed, for each of the twelve should be convinced beyond all reasonable doubt of the commission of the same particular specific act or series of acts necessary to constitute the complete crime charged in the particular count being passed upon, or a verdict of "Guilty" should not be rendered thereon.

Defendant's Instruction.

By her plea of "not guilty," the defendant has put in issue every material allegation in the information and each and every count [fol. 72] therein contained, and upon the prosecution is placed the burden of proving her guilt beyond and to the exclusion of all reasonable doubt. The information and the various counts therein contained in themselves are no evidence of guilt and cannot be regarded as such. The information proves nothing concerning guilt itself and the cause of the State must be maintained, if at all, by proof adduced at the trial.

Evidence has been admitted in this case of statements, acts and declarations of persons other than the defendant, and not made and done in the presence of the defendant, and of printed matter purporting to be printed matter of the I. W. W. and of the Communist Labor Party, or circulated or publicly displayed by the I. W. W. and by the Communist Labor Party, and taken from places and at times at which the defendant was not present, and which was not directly connected with the defendant, and which the evidence does not show was circulated, printed, or publicly displayed with her acquiescence or consent. Evidence has also been admitted of other objects which are not directly connected with the defendant.

The Court instructs you that such evidence was admitted for but one purpose, and is to be considered by you for that one purpose only, and that is to determine the character of the organization of which it is claimed the defendant was a member, or which it is claimed she organized or assisted in organizing, namely, whether or not it was an organization, society, group or assemblage of persons organized or assembled to advocate, teach, or aid and abet criminal syndicalism, as defined in the statute from which I have read to you.

All pamphlets, printed matter, and other exhibits in evidence in this case, which you determine from the evidence to be printed, circulated, or publicly displayed with her knowledge, acquiescence and consent, you will consider for all purposes material to this case.

No opinions you may have gained from reading newspapers prior to this trial as to the character of the Communist Labor Party, of the Soviet Government of Russia, or any other organization or person mentioned in the evidence, must be allowed to weigh in any degree with you in arriving at a verdict. You must judge of their [fol. 73] character so far as it has anything to do with this case solely by the evidence introduced here, and it is your duty (for the purposes of this trial) to consider such character to be good unless the contrary is proved beyond all reasonable doubt.

Defendant's Instruction.

The Court further instructs you that it is not incumbent upon the prosecution to prove the exact date upon which the crime was committed, if any crime was committed by the defendant, but it is sufficient to prove that the acts constituting the crime were committed at or prior to the time alleged in the information and subsequent to the 30th day of April, 1919.

You are here, ladies and gentlemen, for the purpose of trying issues of fact that are presented by the information filed against the defendant and the defendant's plea thereto. This duty you should perform uninfluenced by pity for the defendant or by passion or prejudice on account of the nature of the charge against her. You are to be governed therefore solely by the evidence introduced in this trial and the law as given you by the Court. The law will not permit jurors to be governed by mere sentiment, conjectures, sympathy, passion or prejudice. A verdict founded upon sentiments of pity, for the accused, or upon public opinion or public feeling, or

upon passion or prejudice or upon conjectures would be a false verdict. You will not take counsel of them in deliberating upon your verdict. The importance of your duties requires that you consider the right of the People of the State of California to have the laws properly executed and that it is with you, citizens selected from the county, that finally rests the duty of determining the guilt or innocence of those accused of crime.

You should also ever keep in mind the importance to the accused of the result of your deliberations and be just to her, as well as to the People of the State of California. Both the public and the defendant have a right to demand, and they do so demand, and expect that you will carefully and dispassionately weigh and consider the evidence and the law of the case and give to each your conscientious judgment, and that you will reach a verdict that will be just to both sides, regardless of what the consequences may be.

[fol. 74] The law requires that your verdict should be unanimous. Therefore, it will require twelve of your number to acquit, or to convict, as the case may be. Nevertheless, you are not bound to agree upon a verdict unless you can do so conscientiously. If some of your number should conscientiously believe, after a patient, full and complete consideration of all the testimony in the case, that the defendant is guilty, such jurors should vote so to find her; and if some — your number should likewise conscientiously believe, after a due consideration, from all the evidences in the case, that her guilt has not been established beyond and to the exclusion of all reasonable doubt, such jurors should vote "Not Guilty", whether by so doing they agree with the other jurors, or not; in other words, you are not called upon to surrender your honest convictions concerning the effect of the evidence in this case for the mere purpose of arriving at a unanimous verdict.

You are impaneled, however, for the purpose of reaching a verdict, if that be possible. Therefore, be patient in listening to the arguments and reasonings of your colleagues. Let your minds be receptive to the influence of logic; then, after a patient and kindly and conscientious weighing of all the evidence, agree upon a verdict if that be possible.

The defendant has offered herself as a witness in her own behalf. The Court charges you that the defendant is entitled to testify as a witness in this case, and it is the duty of the jury to weigh, examine and take into consideration the testimony of the defendant and give it due consideration. If consistent and convincing, act upon it. If it raises in the minds of the jury a reasonable doubt of the defendant's guilt, she is entitled to the benefit of such reasonable doubt and to a verdict of "Not Guilty".

For your convenience, three forms of verdict have been prepared. They are as follows:

After the entitlement of the Court and cause: "We, the jury in the above entitled cause, find the defendant guilty of felony as charged in the information, and of each and every count therein contained, namely, counts 1, 2, 3, 4 and 5 thereof."

[fol. 75] If, after a careful consideration of all the testimony in this

case, coupled with the foregoing instructions of the Court, you find that the guilt of this defendant of the crime as set forth in the information is proven beyond all reasonable doubt as to each and every count therein contained, it will be your duty to have your foreman sign that verdict and return the same into court.

The second form of verdict is as follows:

After the entitlement of court and cause, "We, the jury in the above entitled cause, find the defendant not guilty". If, after a careful consideration of all the testimony in this case, you believe that the guilt of the defendant of the crime as set forth in the information and as to every count therein contained has not been proven beyond all reasonable doubt, it will be your duty to have your foreman sign that verdict and return the same into court.

The third form of verdict is to be used by you in the event that you find the defendant guilty of one or more counts and not guilty as to the others. That form is as follows:

After the entitlement of the Court and cause, "We, the jury in the above entitled cause find the defendant guilty of felony as charged in the information as to counts " (leaving a blank space for you to fill in the numbers of the counts upon which you find the defendant guilty, if you so do)" and not guilty as to counts" (leaving a blank space for you to fill in the numbers of the counts upon which you find the defendant not guilty, if you so do). "If, after a careful consideration of all the testimony in this case, you believe that the guilt of the defendant of the crime set forth in the information has been proven beyond a reasonable doubt as to certain counts, you may insert the number of the counts upon which you find the defendant guilty, in the blank space provided in the form of verdict I have last read to you. And if you further believe, after a careful consideration of all the testimony, that the guilt of the defendant has not been proven beyond all reasonable doubt as to certain counts set forth in the information, you may insert the numbers of those counts upon [fol. 76] which you find the defendant not guilty in the blank space provided therefor in the verdict last read to you, and have your foreman sign that verdict and return the same into court.

In conclusion, ladies and gentlemen of the jury, I charge you to carefully consider and compare all the evidence in this case which has been offered before you in order that you may conscientiously discharge your sworn duty as jurors and honestly and fairly decide the issue between the People and the defendant.

Let the officers be sworn.

(Four officers sworn to conduct the jury to place of deliberation.)

The Court: Ladies and gentlemen of the jury, the case is now with you for deliberation, consideration and verdict. You will retire to your jury room and when you have arrived at a verdict, notify the officer in charge and you will be returned into court.

(Hereupon the jury retired to deliberate, at 4:50 p. m.)

(At 9:30 p. m. the jury returns into court.)

The Court: Will counsel stipulate that all the jurors are present?
Mr. Harris: Yes, your Honor.

Mr. Coghlan: Yes, your Honor.

The Court: Ladies and gentlemen of the jury, have you agreed upon a verdict?

The Foreman (Mrs. W. E. Haynes): From the way the vote has been cast, we agree on some of the points, and we are unable to agree on others.

The Court: Is there a disagreement as well as an agreement?

The Foreman: There is an agreement and disagreement, yes. And on the forms as presented to us, we are unable to sign them in this form, it is not a complete form, the way it is written here.

The Court: I will ask the jury if they want some further instructions with regard to the verdicts.

The Jury: Yes.

The Court: The same stipulation, I suppose, will be entered into that was entered into respecting the instructions given heretofore; in other words, whatever instructions I may give them, you will stipulate to?

[fol. 77] Mr. Coghlan: In other words, the waiver of instructions, yes, your Honor.

The Court: That the Court may be called upon to give, may be taken orally by the Court—or rather, given orally by the Court, the same to be taken down by the shorthand reporter, and hereafter transcribed, if found necessary?

Mr. Harris: In behalf of the People, yes, your Honor.

Mr. Coghlan: We waive written instructions in this connection.

The Court: Now, I can probably best inform the jury as to what the instructions of the Court will be on the particular subject that has been addressed to me by reading the instructions that I did earlier in the day, on that particular subject.

Juror McClymonds: The trouble, your Honor, if I may state—it is the form of the ballot that you gave us. There is no form in any of the forms given for the verdict that we can use; no form there that we can use.

The Court: I take it there is a form there. Just wait a minute until I read these instructions.

Juror McClymond: Well, there is no form that we can use there without changing one.

The Court: Let me understand, then. (Reading:)

"For your convenience, three forms of verdict have been prepared. They are as follows:

After the entitlement of the Court and cause: 'We, the jury in the above entitled cause, find the defendant guilty of felony as charged in the information, and of each and every count therein contained, namely, counts 1, 2, 3, 4 and 5 thereof.'

"If, after a careful consideration of all the testimony in this case, coupled with the foregoing instructions of the Court, you find that the guilt of this defendant of the crime as set forth in the information is proven beyond all reasonable doubt as to each and every count therein contained, it will be your duty to have your foreman sign that verdict and return the same into court.

"The second form of verdict is as follows:

"After the entitlement of Court and cause, 'We, the jury in the [fol. 78] above entitled cause, find the defendant not guilty'. If after a careful consideration of all the testimony in this case, you believe that the guilt of the defendant of the crime as set forth in the information and as to every count therein contained has not been proven beyond all reasonable doubt, it will be your duty to have your foreman sign that verdict and return the same into court.

"The third form of verdict is to be used by you in the event that you find the defendant guilty of one or more counts and not guilty as to the others. That form is as follows:

"After the entitlement of the Court and cause, 'We, the jury in the above entitled cause find the defendant guilty of felony as charged in the information as to counts (leaving a blank space for you to fill in the numbers of the counts upon which you find the defendant guilty, if you so do) and not guilty as to counts (leaving a blank space for you to fill in the numbers of the counts upon which you find the defendant not guilty, if you so do). If, after a careful consideration of all the testimony in this case, you believe that the guilt of the defendant of the crime set forth in the information has been proven beyond a reasonable doubt as to certain counts, you may insert the numbers of the counts upon which you find the defendant guilty, in the blank space provided in the form of verdict I have last read to you. And you you further believe, after a careful consideration of all the testimony that the guilt of the defendant has not been proven beyond all reasonable doubt as to certain counts set forth in the information, you may insert the numbers of those counts upon which you find the defendant not guilty in the blank space provided therefor in the verdict last read to you, and have your foreman sign that verdict and return the same into Court."

Juror Dutton: Judge, the question is this: We cannot agree on several points. We agree on—

The Court (interrupting): Do I understand, Mrs. Haynes, that you have reached a verdict on some of the counts, and on other of the counts you have disagreed, without stating, now, what your verdict is on any count, is that the completion of affairs?

The Foreman (Mrs. W. E. Haynes): That is the condition, yes, [fol. 79] your Honor.

The Court: That the jury finds itself in now?

The Foreman: Yes, your Honor.

Mr. Coghlan: I don't understand the suggestion that was made by the gentlemen who spoke, as being the case. I would like to have that read.

(The reporter reads statement of Juror Dutton.)

Mr. Coghlan: You can't agree on several points?

The Court: Mr. Dutton, without stating what your verdict is on any one count, if you have agreed upon a verdict, let me ask you: Is this the condition in which the jury finds itself—or rather, the pe-

tion that the jury finds itself in now; That you have agreed upon some of the counts, and you have disagreed upon others?

Juror Damm: Can't agree on others, your Honor, yes.

Mr. Coghlan: Does he understand by "points"—"Counts"? Each one of these counts is a separate charge.

Juror Damm: One of those five points.

Juror McClymonds: He calls them "points;" but it is "counts."

The Court: Do you refer to "counts," when you say "points"?

Juror Damm: I refer to the five indictments.

The Court: Those five indictments, those are counts. Well, you have heard the instructions of the Court. You can, in that event, I would say, record your verdict only as to the counts upon which you have agreed.

Juror McClymonds: And say nothing in the written report about the counts we cannot agree on. Is that it?

The Court: If you have disagreed upon certain counts, there is disagreement and consequently no verdict.

Juror McClymonds: And make no report at all on those counts?

The Court: I do not know of any other way of doing it.

Mr. Coghlan: It is perfectly clear as to just what is meant by this indictment, that there are five separate crimes charged, is it?

Mr. Calkins: I think the Court's instructions have covered that point. I think it is clear as to what the Court means by its present instruction. They can report the counts with regard to which they [Id. 80] have reached a conclusion, and they can disagree on the other counts, for that matter.

The Court: In other words, if there were but one count in this complaint, and there was a disagreement upon that count, there would be no verdict, and you would come into court and report that you had disagreed.

Mr. Coghlan: The defendant is, of course, entitled to a verdict on every count, if a verdict can be reached or arrived at, if there is a conclusion of the jury.

Juror McClymonds: There must, then, be a recollection of that.

Mr. Calkins: The Code, I think, says that they are entitled to a verdict; they are to find upon the counts upon which they do agree, and then report their disagreement which would of course be recorded on the counts on which they cannot agree.

The Court: I have just stated that, I think.

Mr. Calkins: I thought Mr. Coghlan did not understand that.

Juror McClymonds: Report it orally, if we cannot agree; make a oral report.

The Court: That is the only way I know at this time.

Juror McClymonds: Just so we get to understand it exactly.

The Court: That is the only way I know of doing it. Is that all?

Mr. Coghlan: What I am concerned about is the statement of—what is the gentleman's name—as to what is in the juror's mind as to whether he is disagreeing as to the essential guilt of the defendant.

The Court: He stated, I think, in the end what he meant. He did not use the legal phraseology, Mr. Coghlan, but it seemed to me

that he made himself plain. He made it plain, the question, that was bothering his mind. Is that all? You may retire, then.

Juror McClymonds: That is plain now, I think I understand it fully.

(Hereupon the jury retires the second time at 9:43 p. m. to deliberate further.)

(The jury returns into court at 10:42 p. m.)

[fol. 81] The Court: People against Whitney. Will counsel stipulate that the jurors are all present?

Mr. Harris: The People will so stipulate.

Mr. Coghlan: So will we, your Honor.

The Court: I want to say for the benefit of those who have come here tonight, that the jury are here with some sort of a report, and the Court will not have any demonstration whatsoever, and for that reason I want to now warn persons who are likely to become enthusiastic when the verdicts are brought in, because they meet with their approval or sometimes with their disapproval, and in that way commit a breach of the decorum of the court room, and by doing so will of course be immediately remanded to the Sheriff, in the event of any such breach of a decorum.

You have stipulated, have you.

Mr. Harris: We have, your Honor.

Mr. Coghlan: Yes.

The Court: Ladies and gentlemen of the jury, have you agreed upon a verdict?

The Foreman (Mrs. W. E. Haynes): We have, your Honor.

The Court: Let me look at it. You have agreed, as I understand ladies and gentlemen of the jury, upon one or more of the counts, and others you have not agreed upon. Let me ask at this time, are you hopelessly disagreed upon those counts that you have not as yet agreed upon?

Juror McClymonds: I think so.

The Court: Mr. Watson, what do you think about it?

Juror Watson: Well, I guess we have.

The Court: And Mr. Maxfield, what do you say?

Juror Maxfield: I think that is the case.

The Court: And Mr. Collins, do you feel there is no possibility of agreeing upon any of the counts that you have, up to this time, disagreed upon?

Juror Collins: I think there might be.

The Court: What do you think about it, Mr. Damm?

Juror Damm: I don't think there is no sign—I don't think, of [fol. 82] there being an agreement.

The Court: And Mr. Thompson, what do you say?

Juror Thompson: With the present standing of the jury, I don't think there is any possible show of an agreement on some of the counts.

The Court: I will ask you, Mrs. Haynes.

The Foreman (Mrs. Haynes): The same decision, your Honor.

The Court: What do you say about it, Mrs. Helliker?

Juror Helliker: The same.

The Court: And you, Mrs. Rogers.

Juror Rogers: I don't think we could.

The Court: And you, Mrs. Bradshaw?

Juror Bradshaw: I don't think we could agree.

The Court: And you, Mrs. Morton?

Juror Morton: I don't think we can agree.

The Court: And you, Mrs. Garcia?

Juror Garcia: No chance at all.

The Court: In the light of all the discussion and the consideration that the jury has given during the hours that they have been in retirement, you feel, then, ladies and gentlemen of the jury, that you cannot agree on any of the other counts?

A Juror: I do.

Another Juror: I do.

Another Juror: I do.

The Court: And do you still think that there will be no possibility of agreeing?

A Juror: No, your Honor.

Another Juror: No, your Honor.

Another Juror: No, your Honor.

The Court: In the light of what has been said, and after hearing them all express their views—you don't think so, Mrs. Haynes?

Juror Haynes: I hardly think so.

The Court: You have heard, gentlemen, the Court interrogate each one of the jurors, and it seems to me that the jury is hopelessly disagreed on the other counts. May I ask you how you stand numerically—now, not how many votes went for guilty, or how [fol.83] many votes for not guilty on the other counts, but numerically—we will say, six to six, or five to seven, or eight to four, or seven to five—as to the other counts?

A Juror: Not all of them.

The Court: Seven to two?

A Juror: Ten to two.

Another Juror: Ten to two on one count.

The Court: I am of the opinion, gentlemen, that the jury has disagreed upon the others.

Mr. Coghlan: Ten to two, on what count?

A Juror: The fifth count.

Juror Watson: The fifth count, it was ten to two.

Mr. Coghlan: On the fifth?

Juror Watson: Yes, sir.

The Court: Are you ready to accept the verdict on those counts that have been agreed upon at this time?

Mr. Harris: We have the same degree of confidence in your Honor's good judgment that we have had heretofore, and we will leave it entirely in your Honor's hands.

Mr. Coghlan: I don't know what this purported verdict is, as yet.

Juror Collins: Your Honor, I think that if you send the jury back, they will agree on some of the counts, more than they have.

Juror Thompson: I don't.

Juror Damm: What is the use of going back? There is no possibility of an agreement—by such stupidity as that. What's the matter with you?

The Court: There is quite a disagreement in the jury room as to whether there would be a possibility of an agreement upon that count. My own judgment is that when eleven jurymen, or eleven jurymen and jurywomen, say that they are hopelessly disagreed, that there isn't much use in continuing them in their efforts to agree, and it seems to me that we should accept the verdict and accept their report on the other counts. One of them has been settled by the jury, or more, for that matter. Let the foreman read the verdict.

[fol. 84] The Foreman (Mrs. Haynes): "Superior Court, State of California, in and for the County of Alameda. The People of the State of California, Plaintiff, versus Charlotte A. Whitney, defendant. Verdict of Jury: We, the jury in the above entitled cause find the defendant guilty of felony as charged in the information as to count one, and disagree on counts two"—

The Court (interrupting): That is not in the verdict, is it?

The Foreman: No.

The Court: Just read your verdict in this case.

The Foreman: Then the first count, it is just the Count One.

The Court: Then you may report.

Mr. Calkins: Is the verdict signed, your Honor?

Juror McClymonds: It is not all read.

The Court: Read all of the verdict.

The Foreman (continuing):—"Charged in the information as to count one." "Mrs. W. E. Haynes, Foreman."

Then I am to say just verbally that the jury is unable to agree on counts two, three, four and five?

The Court: Yes, the Clerk will record the verdict.

(The Clerk records the verdict.)

The Clerk: The verdict is recorded, your Honor.

The Court: Mr. Clerk, you may read the verdict as recorded.

The Clerk: Ladies and gentlemen of the jury, you will now listen to the reading of your verdict as recorded.

"Superior Court of the State of California, in and for the County of Alameda. The People of the State of California, plaintiff, versus Charlotte A. Whitney, Defendant. Verdict of Jury. We, the jury in the above entitled cause, find the defendant guilty of felony as charged in the information as to counts one, and not guilty as to counts blank. Mrs. W. E. Haynes, Foreman."

Ladies and gentlemen of the jury, is that your verdict?

The Court: Do you desire the jury polled.

Mr. Coghlan: Yes, your Honor.

The Clerk: You cannot poll them yet, I have not completed, Your Honor.

The Court: Oh, pardon me.

[fol. 85] The Clerk (continuing): Ladies and gentlemen of the jury, you and each of you, is that your verdict as read and recorded.

(The jury answer unanimously in the affirmative.)

The Court: Do you desire the jury polled?

Mr. Cogblan: Yes.

The Clerk: Etta Bradshaw, is that your verdict as read and recorded?

Juror Bradshaw: It is.

The Clerk: J. A. Collins, is that your verdict as read and recorded?

Juror Collins: Yes.

The Clerk: Joseph Damm, is that your verdict as read and recorded?

Juror Damm: Yes.

The Clerk: Margaret E. Garcia, is that your verdict as read and recorded?

Juror Garcia: Yes.

The Clerk: Anna Helliker, is that your verdict as read and recorded?

Juror Helliker: Yes.

The Clerk: Mrs. W. T. Morton, is that your verdict as read and recorded?

Juror Morton: Yes.

The Clerk: F. M. Maxfield, is that your verdict as read and recorded?

Juror Maxfield: Yes.

The Clerk: J. W. McClymonds, is that your verdict as read and recorded?

Juror McClymonds: Yes.

The Clerk: Ruth L. Rogers, is that your verdict as read and recorded?

Juror Rogers: Yes.

The Clerk: H. C. Thompson, is that your verdict as read and recorded?

Juror Thompson: Yes.

[fol. 86] The Clerk: J. A. Watson, is that your verdict as read and recorded?

Juror Watson: Yes.

The Clerk: Mrs. W. E. Haynes, is that your verdict as read and recorded?

Juror Haynes: Yes.

The Clerk: The jurors all affirm the verdict as read and recorded, your Honor.

Mr. Calkins: If your Honor please, it will appear of record that the jurors have disagreed as to counts two, three, four and five?

The Court: Yes. There is nothing more left for the Court to do

at this time but to discharge the jury. Ladies and gentlemen of the jury, you have served in the capacity of jurors, or members of the jury, for the past three months. During the time that you have served we have been in this court room on many, many occasions and I want to say that I appreciate the courtesy—the courteous treatment, and the way that you have particularly acted towards the Court and its officers. I am merely saying these few words of appreciation tonight, as the panel upon which you served as members has been discharged, and this is the winding up of your services as jurors in the Superior Court of this county, for the time being, at least.

Mrs. W. E. Haynes: On behalf of the jurors, we wish to extend our appreciation for the courtesy that has been extended to us from the Court and the attorneys in this case.

The Court: The jury may now be discharged, and excused from further service.

Mr. Calkins: Will you fix a date, or make the customary order respecting the disposition of this case further?

The Court: Can we agree upon some date for the taking up of the counts upon which the disagreement of the jury has been recorded?

Mr. Calkins: That may be continued until Tuesday, if the Court please, to be set, I take it, your Honor; and a day set for sentence.

The Court: For such further proceedings as may be necessary in this case.

Mr. Coghlan: I should like as early a date as possible to present [fol. 87] a motion for a new trial in this case.

The Court: How early would you like? That could not be before Tuesday, very well. Monday being a holiday.

Mr. Harris: I have another motion that I think I ought to address the Court upon, before continuing the matter for further proceedings.

The Court: For sentence and for further trial?

Mr. Harris: For the setting of the other cases for trial.

The Court: Very well. Tuesday morning at 9:30, that being arraignment day.

Mr. Coghlan: Now, then, if the Court please, this lady came here today unprepared, of course, for this verdict, absolutely unprepared. She has been on bail since the beginning of this cause and she is a member of this community, lived here a very great number of years, and she has her two bondsmen here in court. I am going to ask if this Court will not indulge her until tomorrow morning, that she may go with her bondsmen and come into court here and submit herself, after having prepared herself somewhat for this emergency. I address that motion to your Honor's sound discretion, and I think that it could be done with entire safety to the People of the State of California, and I think it can only be a matter of right and charity, that such a thing as that be allowed in this particular case by reason of the sex of the defendant. Of course, finally she would have to come here and render herself amenable to any order of this court. But it seems to me I am not asking overmuch, and I think that

this Court has the discretionary right to allow her to go under her present bond until tomorrow morning.

The Court: It is really controverting every precedent of this Court, for, not only during the time that I have been here, but every precedent of the court from the time that I have known anything about this court house, to permit a defendant after conviction to go upon bail, unless the health, as shown by reports of physicians, made it absolutely necessary to admit them to bail. That is the precedent, and that has always been. It does not particularly pertain to one case or to another case, nor to whom the defendants have been, [fol. 88] either, in those instances, during the many, many years of the existence of this court house and the trials had therein.

Mr. Coghlan: Of course, the matter of bail is discretionary after conviction, with the Court, and I do not suppose that the matter of tradition will stand in the road of the proper presentation at the proper time, of a motion to fix such bail as your Honor may deem fit.

The Court: I am not going to shut you out from an opportunity to again present your motion, but at this particular time, I would not feel inclined, in the light of precedence, to grant that motion at all. Let the defendant be remanded.

Mr. Coghlan: The bondsmen of this lady are here, and ready to go upon her bail, and that was the reason why I addressed that motion to the Court.

[File endorsement Title omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF ALAMEDA

[Title omitted]

DEFENDANT'S APPLICATION AND DESIGNATION OF GENERAL GROUNDS
OF APPEAL AND DEMAND FOR TRANSCRIPTION OF PHONOGRAPHIC
NOTES AND ORDER FOR TRANSCRIPT—Filed Feb. 29, 1920

The defendant and appellant above named, Charlotte A. Whitney, having heretofore and on the 24th day of February, 1920 appealed from the order of the above entitled court in the above entitled cause denying her motion for a new trial of said cause, and from the [fol. 89] judgment and sentence in the above entitled cause, both made and entered herein on the 24th day of February, 1920, comes now, and pursuant to the provision of section 1247 of the Penal Code of the State of California, presents her application to the above entitled Court, the same being the trial Court in the above entitled cause, stating in general terms the grounds on which she relies, and designating what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon.

In general terms the grounds of appeal and the points upon which appellant relies herein are:

(1) That the Court erred in overruling each and every objection of the defendant to the admission in evidence of testimony offered by the prosecution during the course of the trial.

(2) That the Court erred in sustaining each and every objection sustained, which was, during the course of the trial made by the prosecution to the admission in evidence of testimony offered by the defendant, and that the Court erred in each and every instance during the course of said trial wherein the Court refused to allow testimony offered by the defendant to go to the jury in the above entitled cause.

(3) That the Court erred in the decision of questions of law arising during the course of the trial.

(4) That the Court erred in allowing the prosecution to introduce certain testimony over objection of defendant during the course of the trial; that the Court erred in refusing to allow the defendant to introduce certain testimony during the course of the trial.

(5) That the Court gave certain erroneous instructions concerning the law to the jury.

(6) That the verdict rendered in the above entitled cause is contrary to law.

(7) That the verdict rendered in the above entitled cause is contrary to the evidence introduced at the trial of said cause.

(8) That the Court erred in denying the defendant's motion for a new trial in the above entitled cause.

(9) That the Court erred in refusing to give certain instructions offered and submitted by the defendant to the jury.

(10) That the Court erred in modifying certain instructions [fol. 90] offered and submitted by the defendant.

(11) That the Court erred in overruling the demurrer of the defendant to the information on file herein.

(12) That the Court erred in receiving and recording the verdict, or purported verdict, or record herein.

(13) That the Court erred in discharging the jury in the above entitled cause before said jury had returned a verdict or made a finding respecting the second, third, fourth and fifth counts set forth in the information on file herein.

(14) That the Court erred in refusing to allow the counsel for defendant to cross-examine certain witnesses who testified at the trial of the above entitled cause, as to the conduct of the defendant

herein at a convention held by the Communist Labor Party at Loring Hall in the City of Oakland, County of Alameda, State of California.

(15) That the Court erred in denying the defendant the right and privilege of appearing for and representing herself in the above entitled Court and cause, and in compelling her to proceed to trial with counsel not of her own choice.

(16) That counsel for the people was guilty of misconduct which was highly prejudicial to the defendant, both during the course of the trial and during the final argument for the prosecution, and also that counsel for the prosecution was guilty of misconduct during the examination of prospective jurors.

And that defendant hereby demands the transcription of all of the phonographic notes taken during the course of the trial of the above entitled cause.

And that defendant and appellant hereby designates all of said phonographic reporter's notes taken during the whole course of the trial, and including the examination of prospective jurors and also including those portions of the closing argument of counsel for the prosecution to which objection was made by defendant's counsel as necessary to be transcribed to fairly and fully represent the points relied upon by herself, as hereinabove set forth.

Dated: This 26th day of February, 1920.

[fol. 91] Charlotte A. Whitney, Defendant and Appellant. J. E. Pemberton and Nathan C. Coghlan, Attorneys for Defendant and Appellant.

It is hereby ordered, that W. T. McSorley the phonographic reporter who reported the above entitled cause transcribe the phonographic notes hereinabove referred to, and that a transcript be furnished as hereinabove requested.

Dated: This 1st day of March, 1920.

James G. Quinn, Judge.

[File endorsement omitted.]

IN THE SUPERIOR COURT OF THE COUNTY OF ALAMEDA, STATE OF CALIFORNIA

[Title omitted]

NOTICE OF MOTION FOR BILL OF PARTICULARS

You are hereby notified and notice is hereby given that on the 16th day of January, 1920, at the hour of 9:30 o'clock A. M. or as soon thereafter as counsel can be heard at the Court Room of Dept. 5 of the Superior Court above-named in the County Court House in Oakland, said County and State, defendant above-named will move the said Court for an order requiring and directing the

plaintiff above-named (acting through the District Attorney of said County) to furnish, within such reasonable time as the court may fix, a Bill of Particulars and Statement of Particulars showing what specific acts plaintiff accuses defendant of having done, and — which plaintiff intends to offer proof at the trial of the cause, and also [fol. 92] what doctrine is she and the organization referred to in the first Count of the Information are accused of advocating, teaching, aiding and abetting, sufficient to show, and enable defendant to know, the following:

1. As to the First Count of the Information:

(a) Whether the society, group, organization or assemblage referred to therein was organized or assembled to teach aid or abet the commission of crime, sabotage, unlawful acts of force or violence or unlawful methods of terrorism; and if crime, what crime; if unlawful acts of force, what acts; if unlawful methods of terrorism, what methods;

(b) Whether any change or changes for which said acts were or are to be a means of accomplishing were or are political change, change in industrial ownership or change in industrial control, and if either what sort or kind of change, or of what nature;

2. As to the Second Count of the Information:

(a) What books, papers, pamphlets, documents, posters, or written or printed advocacy of criminal syndicalism defendant is accused of printing, publishing, circulating or publicly displaying;

(b) What political change or changes in industrial ownership or control and the sort or nature of change advocated by such books, papers, pamphlets, documents, posters, or other written or printed matter.

3. As to the Third Count of said Information:

(a) What crime, sabotage, violence or unlawful methods of terrorism is or are therein meant or referred to;

(b) What political change or changes, or change or changes in industrial ownership or control is or are therein meant or referred to.

4. As to the Fourth Count thereof:

What spoken or written words of defendant are therein meant or referred to, or the substance of them;

5. As to the Fifth Count thereof:

What personal acts or conduct of defendant are therein meant [fol. 93] or referred to, or, at least, the kind or nature of them.

A motion will also be made separately at said time and place and to said Court to order a specification of each of the items above set out.

Said motion and motions will be made upon the ground that the facts and information sought to be obtained by such Bill of Particulars or Statement of Specifications are necessary to enable defendant to prepare for trial and for defendant to have any fair trial; and will be based upon the affidavits of J. E. Pemberton — of defendant served herewith, upon the information filed herein, and upon all the records and proceedings in this action heretofore taken.

Dated, January 13th, 1920.

J. E. Pemberton, Attorney for Defendant.

To Plaintiff above-named and to Hon. Ezra W. Decoto, District Attorney of Alameda County, California:

Good reason appearing therefor it is hereby ordered that any time necessary for the giving of the above notice is hereby shortened to and fixed at 3 days.

Dated, January 13th, 1920.

James G. Quinn, Judge.

[fol. 94] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

[Title omitted]

AFFIDAVITS ON MOTION FOR BILL OF PARTICULARS—Filed Jan. 16,
1920

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

Charlotte A. Whitney, being first duly sworn, deposes and says:
I am the defendant in the above-entitled action:

I have fully and fairly stated to my attorney, J. E. Pemberton, all facts and circumstances of everything connected with any act, word, or deed of mine during the year just past (1919) which I think could possibly be deemed by the District Attorney of Alameda County or any other person any violation of the Statute referred to in the Information filed herein, and the aims, nature, and methods of every organization, society, group, or assemblage of persons with which I have been at any time during that year affiliated, so far as my memory will allow.

I do not advocate, and never have advocated, knowingly the accomplishment of any political change, or any change in industrial ownership or control by means of crime, sabotage, violence or unlawful methods of terrorism; I have favored, advocated, approved, justified, or attempted to justify no means for any such change or changes other than the use of the ballot and other legal and peaceful means, I have always respected and tried to obey all laws of my country, state and city.

I do not know, nor have any idea, what the District Attorney

thinks I have done, which he thinks constitutes a violation of what he thinks the meaning of that statute to be.

I did deliver an address on the date mentioned in the Information [fol. 95] (November 28, 1919) to and before the "Oakland Center of the Civic League," an organization of female citizens of California, on the subject of "The Negro Problem in the United States;" and I am credibly informed that certain police officers of the City of Oakland had immediately theretofore advised and urged and insisted to the members of that "Center" that I should not be allowed to deliver any such address; and very shortly after its delivery and on the same afternoon I was arrested by one of said police officers, the only time I have ever been arrested on any charge of any violation of said statute. The warrant of arrest, the complaint upon which it was based, and all the evidence and proceedings at my preliminary examination in the police court purported to refer only to an occurrence taking place on the 9th day of November, 1919, an attempted reorganization of one wing of the former Socialist Party, or matters connected therewith. No other date or time of any act, or purported act, word or deed of mine was mentioned, or referred to, in the proceedings at the said preliminary examination other than the 9th day of November, 1919, or connected with the occurrence last above referred to. That was the only preliminary examination I had.

As I now understand and believe from the Information filed and from the oral statements and admissions of the Deputy District Attorney in open court at the argument of the demurrer to said Information I am to be forced to trial upon something connected with an entirely different occurrence, to-wit, that of November 28th, 1919,—and of what it is connected with that occurrence that I am to be called upon to meet, I have not the slightest idea, or knowledge; and the proceedings at the preliminary examination give not the slightest intimation thereof.

Unless the information to be had through the "Bill of Particulars" (notice of motion for which is hereto attached, hereby referred to and made a part hereof) is obtained by myself or my attorney, neither I nor he can intelligently prepare for trial; and without such information a fair trial cannot be had.

For his information I have furnished to my said attorney a true and at the time the case was set for trial. From what he then said [fol. 96] of November, 1919.

Charlotte Anita Whitney.

Subscribed and sworn to before me this 13th day of January, 1920. Nettie Hamilton, Notary Public in and for the said City and County of San Francisco. (Seal.)

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

J. E. Pemberton, being first duly sworn, deposes and says:

I am an attorney at law, and as such have been actively engaged in practice in the courts of this state for more than thirty-three years;

and during a considerable part thereof have given special study and attention to the laws thereof relating to crime. I have carefully studied the statute referred to in the information filed in the above-entitled matter; and, while I have attacked its constitutionality, for all purposes of this affidavit, I treat it as valid.

I heard all the evidence taken at the preliminary examination of the above-named defendant before the magistrate in the police court, and have since read, and carefully reread the same. I have read the copy furnished me by defendant of what she asserts me to be the address delivered by her on November 28, 1919. I have listened carefully to all statements made by the District Attorney at the argument of the motion to set aside the Information filed in said action. I have carefully questioned defendant regarding all matters which I thought might possibly give me any information which would help me to defend her at the trial, or give me any idea or guess what the District Attorney thinks she has done which he thinks to be any violation of what he thinks said statute to mean; and she has answered me completely and with apparent candor. I have also talked with many of her friends and associates on the same subject and questioned them in like manner. What she says in her affidavit regarding the evidence at the preliminary examination before the committing magistrate is true.

[§ 97] I carefully listened to all arguments and statements made by the Deputy District Attorney at the argument of the demurrer, and at the time the case was set for trial. From what he then said and from the date mentioned in the Information I conclude it is his intention to produce evidence at the trial of some matter or matters connected with the occurrence of November 28th, and "venturing around that date," as he orally said, to substantiate.

From all the information I have been able to get, I have learned or heard of nothing done by defendant at any time which in my opinion or judgment constitutes any infraction of the statute, or violation thereof, or any crime whatever. I do not know what, or any specific act or acts the District Attorney or his Deputies think defendant has committed which he or they think constitute any violation of what they think that statute to mean. I have no knowledge, idea, surmise, or suspicion of what, or any, specific act or acts said District Attorney or his Deputies think defendant committed on or about the 28th day of November, 1918, or "venturing around that date," which he or they think violate anything which they think the statute to mean.

I have no knowledge of what facts, evidence, or construction of the law to be prepared to meet at the trial, other than such surmises or guesses as I might make from a mere reading of the statute itself.

I am the attorney for defendant and have been ever since and during the preliminary examination; and the only other attorney he had in the matter (Miss Gail Laughlin) is absent from this state, will be absent therefrom until after the time set for trial hereon, and he had nothing to do with the defense since the preliminary examination, on account of such absence.

Without the information sought to be obtained through the sworn

of a "Bill of Particulars" (motion of motion for which is hereto attached, and is hereto referred to and made a part hereof) I cannot intelligently prepare for trial; and unless I get that information a fair trial cannot be had.

J. K. Pendleton,

[*Id.*, 98.] Subscribed and sworn to before me this 13th day of January, 1920. Hortense Gardner, Notary Public in and for the said City and County of San Francisco. (Seal.)

Receipt of copy of within Notice of Motion and Affidavits admitted this 13th day of January, 1920.

Erna W. Devada, District Attorney of Alameda Co., Cal., By
John C. Colkins, Jr., Assistant.

[File endorsement omitted.]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF ALAMEDA

[Title omitted]

MOTION TO SET ASIDE INFORMATION.—Filed Jan. 6, 1920

Now comes the above-named defendant and moves the Court to set aside the Information against her filed herein, by the District Attorney of above-named County on the ground that before the filing thereof the defendant had not been legally constituted by any magistrate for the offense charged in the Information, or for any offense.

Said defendant also moves the Court separately to set aside the First Count of said Information on the ground that the defendant had not been legally constituted by any magistrate for any offense charged or attempted to be charged in that count before the filing of said Information.

Said defendant also moves the Court separately to set aside the Second Count of said Information on the ground that the defendant [*Id.*, 99] had not, before the filing of said Information, been legally constituted by any magistrate for any offense charged or attempted to be charged in that count.

Said defendant also moves the Court separately to set aside the Third Count of said Information on the ground that the defendant had not, before the filing of said Information, been legally constituted by any magistrate for any offense charged or attempted to be charged in that count.

Said defendant also moves the Court separately to set aside the Fourth Count of said Information on the ground that the defendant had not, before the filing of said Information, been legally consti-

ed by any magistrate for any offense charged or attempted to be charged in that count.

Said defendant also moves the Court separately to set aside the fifth Count of said Information on the ground that the defendant had not, before the filing of said Information, been legally committed by any magistrate for any offense charged or attempted to be charged in that count.

These motions are based, and each of them is based, upon said information, the document purporting to be a complaint before the magistrate, the purported commitment by the magistrate, and the evidence taken before said magistrate, all of which are on file herein.

Dated, January 6th, 1920.

J. E. Pendleton, Attorney for Defendant.

[File endorsement omitted.]

[Id. 100] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

[Title omitted]

DEMURRER TO INFORMATION—Filed Jan. 7, 1920

Now comes defendant above-named and demurs to the Information upon on the following grounds:

1. That it appears upon the face thereof that it does not substantially conform to the requirements of section 950 of the Penal Code—in that it contains no statement of the acts constituting the alleged offense in ordinary or concise language or in such manner as to enable a person of common understanding to know what is intended.

2. That it appears from the face thereof that it does not substantially conform to the requirements of section 952 of the Penal Code—in that it is not direct or certain in regard to the offense charged, or the particular circumstances of the offense charged, they being necessary to constitute a complete offense.

3. That the facts stated do not constitute a public offense, for the reason that the purported statute therein referred to is void, invalid, and unconstitutional.

Demurrier to First Count of Information

Defendant likewise demurs to the First Count of said information upon and all of the following grounds:

1. That it appears upon the face thereof that it does not substantially conform to the requirements of section 950 of the Penal

Code,—in that it contains no statement of the acts constituting the alleged offense in ordinary or concise language or in such manner as to enable a person of common understanding to know what is intended.

2. That it appears upon the face thereof that it does not substantially conform to the requirements of section 952 of the Penal Code,—in that it is not direct or certain in regard to the offense [fol. 101] charged, they being necessary to constitute a complete offense.

3. That the facts stated do not constitute a public offense, for the reason that the purported statute therein referred to is void, invalid, and unconstitutional.

Demurrer to Second Count of Information

Defendant likewise demurs to the Second Count of said Information on each and all of the following grounds:

1. That it appears upon the face thereof that it does not substantially conform to the requirements of section 950 of the Penal Code,—in that it contains no statement of the acts constituting the alleged offense in ordinary or concise language or in such manner as to enable a person of common understanding to know what is intended.

2. That it appears upon the face thereof that it does not substantially conform to the requirements of section 952 of the Penal Code, in that it is not direct or certain in regard to the offense charged, or the particular circumstances of the offense charged, they being necessary to constitute a complete offense.

3. That the facts stated do not constitute a public offense, for the reason that the purported statute therein referred to is void, invalid, and unconstitutional.

Demurrer to Third Count of Information

Defendant likewise demurs to the Third Count of said Information on each and all of the following grounds:

1. That it appears upon the face thereof that it does not substantially conform to the requirements of section 950 of the Penal Code,—in that it contains no statement of the acts constituting the alleged offense in ordinary or concise language or in such manner as to enable a person of common understanding to know what is intended.

2. That it appears upon the face thereof that it does not substantially conform to the requirements of Section on 950 of the Penal Code,—in that it is not direct or certain in regard to the offense charged, or the particular circumstances of the offense charged, they being necessary to constitute a complete offense.

3. That the facts stated do not constitute a public offense, for [fol. 102] the reason that the purported statute therein referred to is void, invalid, and unconstitutional.

Demurrer to Fourth Count of Information

Defendant likewise demurs to the Fourth Count of said Information on each and all of the following grounds:

1. That it appears upon the face thereof that it does not substantially conform to the requirements of Section 952 of the Penal Code,—in that it contains no statement of the acts constituting the alleged offense in ordinary or concise language or in such manner as to enable a person of common understanding to know what is intended.

2. That it appears upon the face thereof that it does not substantially conform to the requirements of Section 950 of the Penal Code,—in that it is not direct or certain in regard to the offense charged, or the particular circumstances of the offense charged, they being necessary to constitute a complete offense.

3. That the facts stated do not constitute a public offense, for the reason that the purported statute therein referred to is void, invalid, and unconstitutional.

Demurrer to Fifth Count of Information

Defendant likewise demurs to the Fifth Count of said Information on each and all of the following grounds:

1. That it appears upon the face thereof that it does not substantially conform to the requirements of section 950 of the Penal Code,—in that it contains no statement of the acts constituting the alleged offense in ordinary or concise language or in such manner as to enable a person of common understanding to know what is intended.

2. That it appears upon the face thereof that it does not substantially conform to the requirements of section 952 of the Penal Code,—in that it is not direct or certain in regard to the offense charged, or the particular circumstances of the offense charged, they being necessary to constitute a complete offense.

3. That the facts stated do not constitute a public offense, for the reason that the purported statute therein referred to is void, invalid, and unconstitutional.

[fol. 103] Wherefore, defendant prays judgment that said information be dismissed, defendants bail exonerated and defendant herself discharged, and freed from further prosecution.

Dated, January 6th, 1920.

J. E. Pemberton, Attorney for Defendant.

[File endorsement omitted.]

IN THE SUPERIOR COURT OF THE COUNTY OF ALAMEDA, STATE OF
CALIFORNIA

[Title omitted]

CLERK'S CERTIFICATE

I, Geo. E. Gross, County Clerk of the County of Alameda, State of California, and Ex-officio Clerk of the Superior Court, in and for said County, do hereby certify the foregoing to be a true copy of the Judgment entered in the above entitled action, and recorded in Minute Book No. 37/898 of said Court, at page 316. And I further certify that the foregoing papers, hereto annexed, constitute the Judgment Roll in said action.

Witness my hand and the seal of said Superior Court, this 1st day of Mar. A. D. 1920.

Geo. E. Gross, Clerk, By L. A. Rudolph, Deputy Clerk.
(Seal).

[File endorsement omitted.]

[fol. 104] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

[Title omitted]

CLERK'S CERTIFICATE

I, Geo. E. Gross, County Clerk of the County of Alameda, State of California, and ex-officio Clerk of the Superior Court, in and for said County, do hereby certify that the foregoing is a full, true and correct copy of the Judgment Roll in the above entitled action, and that said original is now on file and of record in my office.

Witness my hand with the seal of said Superior Court affixed this 16th day of March, 1920.

Geo. E. Gross, County Clerk, By L. A. Rudolph, Deputy.
(Seal.)

[fol. 105] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA, DEPARTMENT
No. 5

Before Hon. James G. Quinn, Judge, and a Jury

[Title omitted]

Oakland, California, January 27, 1920.

Appearances: For the People, John U. Calkins, Assistant District Attorney, and Myron Harris, Deputy Assistant District Attorney; For the Defendant, Thomas M. O'Connor and J. E. Pemberton.

The Court: People against Whitney. Call the jury, Mr. Clerk.
(Jury polled.)

The Clerk: The jury are all present, your Honor.

The Court: All the jury are present.

Mr. Pemberton: If the Court please, in this case, I ask that the name of Thomas M. O'Connor be entered as attorney for the defendant.

The Court: Associated with the counsel for the defendant?

Mr. Pemberton: Yes, your Honor.

The Court: The motion is granted. Mr. O'Connor may be entered as of counsel for the defendant.

Mr. O'Connor: If your Honor please, owing to personal difficulties which beset me this morning, due to the illness of my little girl, of the flu, in San Francisco, who is confined to her bed and quite seriously ill—on that personal consideration, I would request a short continuance in this matter. I understand that this is the first calling of the matter, after it was set, and the defendant is out on [fol. 106] bail, and there has been no further alleged activity of the lady, as far as I understand, so far as any evidence that she has, the police have attended to it by raiding her house, I understand, during the time that the matter has been pending in this court. So I imagine that the prosecution will suffer no hardship from a continuance of the case, and of course it will be necessary to have some preparation in this case, and on those grounds, your Honor, urging the personal consideration, I would request a continuance of until next Monday, at which time I assure the District Attorney's office and your Honor that we will be ready to proceed without any further delay and as expeditiously as possible.

The Court: Mr. O'Connor, the case has been set and noticed for to-day, and the calendars have all been re-arranged for the trial of this case. I would like to, on personal grounds, for instance, on the grounds set forth, grant a continuance, but I cannot, under the circumstances of the readjustment of the calendar and the work of the Court, conveniently for the Court, and without a great deal of inconvenience and obstacles in the way of the transaction of business in the criminal cases, grant the continuance, and the motion, for those reasons, will have to be denied. So you may proceed.

Those of the jury will kindly take places or positions on this side of the court room, until their names are called. Where is the District Attorney?

Mr. Harris: Here he is, your Honor; I am ready.

The Court: You may proceed.

The Clerk (calling name of juror): Margaret E. Garcia.

The Court: Take your place in the jury box here, Mrs. Garcia.

The Clerk (calling name- from jury-box): E. O. Church, J. O. Watkins, David McCarron, Julia Hyland, Anna Helliker, J. A. Collins, Henry T. Smyth, Nettie Cunningham, Etta Bradshaw, Thomas Wake, H. A. Thompson.

The jurors will rise and be sworn, please.

(Twelve jurors sworn to answer questions touching their qualifications to sit as jurors in the case.)

Mr. Calkins: If your Honor please, and ladies and gentlemen of the jury: I will now read the information (reading):

[fol. 107] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA, DEPARTMENT
No. 5

Before Hon. James G. Quinn, Judge, and a Jury

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

v.

CHARLOTTE A. WHITNEY, Defendant

Oakland, California, Wednesday, January 28, 1920.

Appearances: For the People, John U. Calkins, Jr., Asst. Dist. Atty., and Myron Harris, Deputy Dist. Atty.; for the Defendant, Thos. E. O'Connor and John A. Pemberton.

Opening Statement for the People

Mr. Harris: May it please the Court, and you, Ladies and Gentlemen of the Jury: I will give you a very brief synopsis of the case that the People of the State of California intend to prove.

We expect to show that for some time past Miss Whitney has been more or less interested in the Socialist Party; that during the Spring of last year and early summer there was a great deal of dissatisfaction in the Socialist Party; that there was what was known as the conservative element, and a more or less radical element. The conservative element had always been for changes in our government by the ballot, by political method, and the radical method was for changes by industrial action and such other action as we might term direct action.

[fol. 108] We will show that in the summer of last year there were delegates elected to what was known as the Chicago convention of

the Socialist Party; that the delegates, I believe there were six to be elected from Oakland; the delegates that were to be elected from Oakland were to take and announce what stand and what position that they took regarding the conservative and radical element.

We will show that Miss Whitney voted for certain candidates to this convention. We will show, for instance, that one of these candidates—well, we will just name one of them—Max Bedacht, for instance, told in "The World," which is a newspaper, and which was the official organ of the Socialist Party, the exact stand that he took. Miss Whitney was a subscriber to "The World." That his position, for instance, as laid down in this paper, "The World," was that he has always been a revolutionary Socialist, and believed that the party must steer clear of the reform program, and that revolutionary acts must be placed in the hands of the masses. We will show that she voted for that man who stood upon that platform. We will show that she voted for five other people who stood upon some similar platform, not for change by the ballot but for change by industrial action, and direct action.

We will show that those delegates who were to be sent to the Chicago convention were sent from Oakland with the distinct understanding that they must be for the breaking away of the conservative element of the Socialist Party, or else they were to retire from the convention—in other words, they must be for what was commonly termed the left wing of the Socialist Party, or the Communist Labor Party. That after they had returned from Chicago, there was a meeting of the Socialists in Oakland—that is, of the Socialist Party in Oakland—a meeting called to separate the conservative element from the radical element; in other words, the organization of this party which was termed the Communist Labor Party.

We will show that the Communist Labor Party was the radical element of the Socialist Party, and was for change by direct or industrial action, not by political action.

We will show that Miss Whitney was elected one of the delegates to this convention for the forming of the Communist Labor [fol. 109] Party. We will show that she attended this meeting, and that she was on at least one of the committees. We will show that at this meeting the American flag was covered over with a red banner. We will show, for instance, that at this meeting they took up the question of what government should be adopted, and what attitude they should have. We will show that a song, some—I believe some of the words were "Hurrah! Hurrah! We will make the Bolshevik victorious," and words such as that. We will show that at this meeting they adopted the Communist Labor program as laid down at Chicago. We will show that they endorsed and adopted the soviet government of Russia as explained and provided for in the third manifesto. We will show that in this Third Manifesto of Russia that our government was to be overthrown and a soviet government was to be established; that they said that the proletariat—or whatever it may be—the establishment of the poorer classes must prevail; that the richer classes must be disarmed and the laboring class must be armed. We will show that they said that

our government, and the machinery of it, must be overturned. We will show that they endorsed the seizing of private property by force. We will show that she was one of the members of this party. We will show, in addition, that her home, when the officers went there with a search warrant, that they found radical and red literature, and that they found I. W. W. songs, and they found the syndicalist book—they found other works turned out by the I. W. W. We will show that her activity throughout this Communist Labor Party has been one of a radical nature. We will show that although she, herself, in expressions of opinion, may have said that she was for changes by political action, but that her every act, that her election on the delegation, that her every attitude and everything that she has done showed her to be a radical, and not of the conservative Socialist Party, but a member of the Communist Labor Party, which is in violation of this law.

Mr. O'Connor: If your Honor please, I did not want to interrupt Mr. Harris in his presentation of the opening statement, but I now move to strike out all of the opening statement save the expression [fol. 110] that Miss Whitney voted for certain delegates, because that, if your Honor please, is the only statement made by Mr. Harris which concerns Miss Whitney in the slightest. Your Honor will note that throughout his opening statement Mr. Harris particularly emphasized the fact that Miss Whitney was on one committee. Now, her actions upon that committee, we will maintain, are perfectly admissible in evidence. But what "they" did, if they sang a song about the Bolsheviki being victorious, it certainly is not to be followed that Miss Whitney shall suffer for their singing. We don't know who "they" are. In other words, if your Honor please, I now move to strike out all of the opening statement save that which has to do with Miss Whitney.

The Court: Let the motion be denied.

Mr. Pemberton: We now wish to move that the Court direct the jury to—or advise the jury to bring in a verdict of "Not Guilty" of the particular offenses charged in this Information on the opening statement of the District Attorney. I wish to present on that motion some of the preliminary papers, and I haven't the slightest objection to the jury hearing everything I have to say, but if the prosecution prefers that this should be argued outside of the presence of the jury, the jury may be dismissed and I will present it. We will be able to do it in five minutes.

The Court: Have you a motion to make? Do you make the motion?

Mr. Pemberton: Yes, your Honor, that the jury bring in a verdict of "Not Guilty," as I said.

The Court: It may be denied.

Mr. Pemberton: The Court won't even hear from me?

The Court: You said you were going to present the preliminary papers that we have already reviewed.

Mr. Pemberton: The point is simply this: The preliminary papers may be considered as presented.

The Court: Yes.

Mr. Pemberton: They show that all that the District Attorney is talking about as having taken place on the 9th of November, the information shows that they are attacking her and charging her in this court with something that took place on the 28th of November.

The Court: That same point has been presented before.

[fol. 111] Mr. Pemberton: Which we know is a different occurrence. This is the point, now: If this jury brings in a verdict of "Not Guilty" in this case on this Information, as I think they will, and hope they will, it will not prevent the District Attorney from starting a new action about the 9th and bringing in the very same facts he is bringing in this case, and the defendant has certain rights.

The Court: Let the motion be denied. You may proceed.

Mr. O'Connor: In view of the fact that the hour of 4 o'clock has arrived, your Honor, and we have gone along very expeditiously, without, I think, but very few words, could we not take an adjournment at this time until tomorrow morning?

Thursday, January 29, 1920.

The Court: Call the case of the People against Whitney. Will counsel stipulate that all the jurors are present, and waive their being polled?

Mr. Pemberton: The defense will.

Mr. Calkins: The People will.

The Court: Very well. You may proceed.

Mr. Calkins: Call Mr. Condon.

ED CONDON, called on behalf of the People, being first duly sworn, testified as follows:

Direct examination.

Mr. Calkins:

Q. What is your name, Mr. Condon—your full name?

A. Ed Condon—Ed is the first name.

Mr. Pemberton: If the Court please, I object to the taking of any testimony in this case on the ground that the Information does not state any public offense. Of course, we are not going to argue it now.

The Court: Motion denied. Proceed.

[fol. 112] Mr. Calkins:

Q. Where do you live?

A. 1919 Virginia Street, Berkeley.

Q. What is your occupation?

A. Newspaper reporter.

Q. Were you a newspaper reporter during the year 1919?

A. I was.

Q. Upon what newspaper were you employed during that time, or during that year?

A. Why, the "Enquirer" and the "Tribune;" later on the "Enquirer" then again the "Tribune."

Q. Taking the month of November, 1919, by what newspaper were you then employed?

A. By the Oakland "Enquirer."

Q. Have you ever been to a building known as Loring Hall, in the City of Oakland?

A. I have, several times.

Q. Where is that located?

A. It is on the southeast corner of 11th and Clay Streets.

Q. In the City of Oakland?

A. Oakland.

Q. How many visits have you made to that Hall?

A. Oh, perhaps three or four.

Q. Tell me what was the date of the first visit?

A. November 9, 1919; that was a Sunday.

Q. That was a Sunday?

A. Yes, the first time I was down there.

Q. How long did you remain there at that time?

A. Well, all together about four or five hours; at two different stretches, out for dinner at noontime.

Q. Did you go there in the morning?

A. I went there and arrived about half past ten or 10:30.

Q. Do you know what was going on at the Hall at that time?

A. Well, at that time there were a large number of people there, perhaps one hundred, for what I understood to be the State convention of the Communist Labor Party, the first State convention to organize the Party.

Q. Was there a meeting on that day?

A. A meeting was later called to order at about 11 o'clock.

Q. Where was that meeting held?

[fol. 113] A. In one of the Halls that comprise the upper floor of the building, at this corner, at Loring Hall.

Q. Can you describe generally the appearance of that Hall?

Mr. Pemberton: We object to this question on the ground that it does not tend to connect with any data or incident mentioned in the Information; it is outside any issue raised by the Information.

The Court: It may be overruled.

Mr. Pemberton: May we understand that this objection, without being renewed, goes to any evidence offered of any other incident than the one alleged to have taken place on or about the 28th day of November—just to save time, just to save the time of renewing the objection?

Mr. Calkins: If your Honor please, I think we had better not make any such stipulation, because it is pretty hard to tell when these objections are going to be made, and I don't think we will save any time if we are going to have the objection anyhow.

Mr. Pemberton: Well, I merely want to save the rights of this defendant in the matter.

Mr. Calkins: I prefer to have the objections made, and we can see what the spirit is in making them.

Mr. O'Connor: Let me suggest this: That, in view of the fact, your Honor, that that is a very original suggestion of Mr. Pemberton, to let that be stipulated to, to save time—I might say that we don't want to be here forever.

The Court: Let us not argue the proposition, when they won't accept stipulations. The Court will not compel anybody to accept a stipulation of any sort. I would not think of it.

Mr. Calkins: Counsel will perhaps re-state the stipulation. I don't want to be an obstructionist, but at the same time I don't want to be bound by these.

Mr. O'Connor: The law imposes upon us the necessity of putting in an objection. Now, that is going to be interminable and prolong the matter. If an objection is put in to every question, but if the gentlemen will stipulate that if one objection is put in it can be over- [fol. 114] ruled, and it will be understood that that objection is put to all the questions, and in that way we will save a vast deal of time, and the witness tells his story in a straight-forward manner so that the jury may get it.

The Court: Well, the Court has no grounds for compelling them to accept a stipulation.

Mr. Pemberton: I will re-state the objection, and perhaps then the prosecution will accept it as re-stated. We wish to save objection to all evidence offered tending to connect this defendant with any other offence than the one charged in the Information to have been committed on or about the 28th day of November, 1918. We don't mean that they are strictly confined to that date, but they are confined to the incident.

Mr. Calkins: We will not make that stipulation.

The Court: I did not hear you.

Mr. O'Connor: The gentleman declines to stipulate, your Honor.

Mr. Calkins: I decline to make that stipulation.

The Court: Well, I have already ruled on the question. Then you asked for a stipulation, and they have declined the stipulation.

Mr. Pemberton: You understand what we are driving at. It is acceptable to us already. We only want to save time. We don't care about it. But that is the one trouble; we can't get to a point.

The Court: Read the question, Mr. Reporter.

(The Reporter reads the question.)

A. The Hall is one about the size of this one, and it is decorated with red banners that extend from the corners to the center, to the chandeliers, common decorations of red crepe paper. It seems to be equipped with red electric-light globes that can be turned on alternately and give a diffused red light there. The place, it is used for social purposes as well as a meeting place for this Party, and on the walls were pictures of Karl Marx and Gene Debs, and several other—

Mr. O'Connor: Will you speak up so that we can all hear you?

A. (Continuing:) On the walls are framed portraits of Eugene Debs and Karl Marx, and several others of the Socialist leaders that [fol. 115] I did not know their names, and in one corner of the room there was an antique bookcase.

Mr. O'Connor: Well, how do you know they are Socialist leaders if you don't know their names, just to inquire in passing?

A. Well—

The Court: Go ahead, proceed.

A. I withdraw the statement that they were Socialist leaders.

Mr. O'Connor: Thank you, I just called your attention, to be careful now. We don't want to go into the realm of speculation.

A. (Continuing:) Yes, in one corner—in fact, I will identify one as Karl Leipnicht, his picture was there. In one corner of the room stood an antique bookcase, one with the double-glass door, commonly seen, and inside of the doors hung an American flag, a silk American flag with a naval service flag with one star upon it in front, and chairs, as usual. That is about all.

Mr. Calkins:

Q. A piano in the room?

A. Yes, a piano stood near the bookcase.

Q. Now, did you notice anything in the hall outside, in the entrance hall outside this main meeting room?

A. Outside of the main meeting room there was a glass showcase and book-shelves in the rear of it, and a large quantity of literature there of all kinds. Some of the contents—there was copies of the Communist Manifesto, copies of the Socialist "World" that is printed here in Oakland, and copies of the "Forge," which is an organ of industrial unionism printed in Seattle, I believe, and one called the "Industrial Worker," and there was several copies of Margaret Sanger's pamphlet on Birth Control, that was suppressed several years ago.

Mr. O'Connor: We will ask that that go out as being a conclusion of the witness.

The Court: The last statement is what you referred to?

Mr. Pemberton: Yes, your Honor.

The Court: Very well, that may go out.

Mr. O'Connor: As being untrue.

The Court: Just a minute—I am striking it out. Let's not discuss whether it is true, or not. The jury is instructed to disregard [fol. 116] that part of that particular answer.

Mr. O'Connor: Will you kindly admonish the witness; he knows a great deal, of course, but we expect him to tell what he knows.

The Court: Yes, we expect that. That is all we want, what you know.

Mr. Calkins:

Q. Continue, Mr. Condon.

A. Besides the literature, let me see, there were other pamphlets, the I. W. W. monthly called "The One Big Union," a monthly

publication of the I. W. W. organization, or so it says in the magazine itself.

Mr. Pemberton: We move to strike that out as not the best evidence, what the magazine said.

The Court: It may go out, "so it says," and the words following it.

Mr. Pemberton: The ones preceding it, too, what was in the magazine.

The Court: What part do you want stricken out, Mr. Pemberton?

Mr. Pemberton: All that that purports to state what the magazine says, as it is not the best evidence. Let's have the magazine and see what it says.

The Court: The part what the magazine says may go out, and they may disregard it; that part of the answer that a certain magazine was found there may remain in evidence.

Mr. Pemberton: Well, they may produce the magazine if they wish.

Jury McClymonds: I don't understand how much goes out and how much remains.

The Court: Well, let's read the answer so that Mr. McClymonds may be clear on the matter. Wait a moment.

The Reporter (Reading): "Published by the I. W. W. Organization, or so it says."

The Court: That which the reporter read may go out, the statement "so it says, published by the I. W. W. organization, so it says," may go out.

The Reporter (Continuing): "in the magazine itself."

The Court: That may also go out.

Mr. Pemberton: "Published by the I. W. W." goes out, too, doesn't it?

The Court: Yes, I think that should go out, too. Let the magazine itself be evidence of what was published in it, if it be offered.

Mr. O'Connor: I assume that those gentlemen will show Miss Whitney's connection with this glass shattering.

The Court: Let's not have any allusion of what your side or the other side may later do before the witness concludes his testimony, and you let the People get through with their witness, please.

Mr. Callins: Mr. O'Connor's turn for testifying immediately comes due by puts on his own witness, but I object to his testifying now.

The Court: I am going to say right now that we are not going to have any of these interruptions in this case.

Mr. O'Connor: We will say at this time, your Honor, that unless the gentlemen connect the matter with Miss Whitney in good faith and they promise the Court that they will connect Miss Whitney with that so-called glass case containing this literature, we will object to the testimony upon the ground that it is incompetent, irrelevant, immaterial, and not binding upon Miss Whitney. The objection is proper to be made at this time.

The Court: Well, if it is not corrected, undoubtedly the testimony will have to be stricken out.

Mr. Collins: I will state that this is what appears to be posing any question. We will submit the glass shovels to Mrs. Wain through the Communist Labor Party.

Mr. Hume: Well, you don't concede that the last objection will be considered as having been made to this line of questioning?

Mr. Collins: As to the shovels and the observations in the Hall.

Mr. Hume: Yes, as to the observations in the Hall.

Mr. Collins: Concerning the shovels observation.

Mr. Collins:

Q. You say that you saw a copy of the United Communist Manifesto?

Mr. Fundation: I objected to as leading.

Mr. Collins: I think he made the statement.

[Ed. 11*] A. I made the statement, yes.

The Court: The stand.

Mr. Collins:

Q. Did you have occasion to examine that Manifesto?

Mr. Fundation: Objected to as incompetent whether he had seen it or not.

The Court: It may be recalled. He says never.

A. Shall I answer?

The Court: Yes.

A. I purchased a copy of the Manifesto, and read it through a number of times.

Mr. Collins:

Q. How did you come to purchase a copy of the Manifesto?

A. Well, that was. I purchased the copy after the convention after the platform which was printed in this pamphlet was adopted as the Platform of the State Party, which was formed at this convention.

Q. Where did you purchase this copy?

Mr. Fundation: Well, to strike out the matter on the ground it is not responsive to the question, and on the ground that it is not the last evidence of what was published.

The Court: It may be recalled.

Mr. Collins:

Q. Where did you purchase this copy of the Manifesto?

A. In the outside meeting held from the committee there. As far as I am not sure that I purchased it, it may have been handed to me.

Q Did it come from the glass chandelier?

A It did.

Q Was there anybody in charge of the distribution of these pamphlets there?

A Well, not specifically, no.

Q Pardon me, I didn't understand that.

A There was no one person in charge; there are a number of one members with whom I am acquainted, and they were all on or less in charge there.

Q Did those persons distribute pamphlets?

A No. I believe not.

Mr. Pennington: Objected to as leading and suggestive, your honor.

THE COURT: Just Mr. McQuinn: I would like to have the question of I did not hear it.

The Court: Do you want the question re-read?

Just Mr. McQuinn: I want the question that was asked the witness.

(The Reporter reads the question.)

The Court: Withdrawing your objection, do you, in view of the court?

The Witness: The answer to that was not complete. Nobody was in conversation, so far as I could learn, besides myself, who was a delegate, and they were all familiar with the contents of this pamphlet, inasmuch as it was adopted as their platform.

Mr. McQuinn: Will that go out as a conclusion of the witness? You were a hundred delegates there.

The Court: It must go out.

Mr. McQuinn: This witness promises to tell us that he knew it was in the minds of each one of those hundred.

The Court: I have ruled on your motion and granted it, and the court may be stricken out.

Mr. Collins:

Q I will show you a pamphlet, and ask you if you know, if anyone seen that before, or one like it (showing)?

A I have seen it, yes, the marking on it makes it look very similar to the one that I purchased, and I subsequently marked it.

Q Do you know what it is?

A That is the Manifesto to which I referred.

Mr. Pennington: Objections, not the best evidence.

The Court: It may be accepted.

Mr. Collins: We will ask that this be introduced in evidence as People's Exhibit 1."

Mr. McQuinn: In evidence for what purpose, if your Honor asks? There is absolutely not the slightest connection between the pamphlet and Miss Whitney, nothing in the record to show.

Mr. Calkins: Well, it is offered for identification. It may be offered for identification, to save trouble.

The Court: It may be received for identification.

Mr. Calkins:

Q. Do you remember from whom you got this copy of the Mani-
[fol. 120] festo to which you refer?

A. I can't say for certain, no. They were distributed there by half a dozen different people; that is, there were half a dozen different people there with whom I am not acquainted that I might have gotten it from. I don't know.

Q. Can you name some of those people?

A. There was Mr. Reed, J. G. Reed, Mr. Snyder, Joseph Snyder, I believe his first name is, J. E. Snyder, and Mr. Smith, E. B. Smith. I guess those are all that I was acquainted with.

Q. Will you tell us, Mr. Condon—you have already mentioned that this meeting, or that meeting, was called to order about 11 o'clock in the morning. Will you mention or tell us what happened at that meeting from the time of its being convened?

Mr. Pemberton: Same objection as I interposed to the former question on this line, that it does not tend to connect this defendant with any thing mentioned in the Information.

The Court: Overruled, and you may proceed to answer.

Mr. O'Connor: I assume, if your Honor please, that Miss Whitney was present at all the times that the gentleman is about to speak of, because, if she were not, it would certainly be hearsay.

The Court: I have ruled on the objection. Let us have no argument on that.

Mr. O'Connor: We will make the further objection, if your Honor please, we object to it upon the ground that it is hearsay, and it does not appear that anything the witness is about to testify to occurred in the presence and hearing of Anita Whitney, the defendant in this case.

The Court: You have already heard the promise on the part of the prosecution to connect this up.

Mr. O'Connor: No, no, your Honor, that was the showcase they were going to connect. Now they have asked the witness as to what occurred at a certain meeting, and we say that it is germane to this case if they will show that at the time the meeting took place, and the things that occurred at the meeting, that Anita Whitney was there.

The Court: They must connect her with the case, of course, and [fol. 121] with that promise, I will permit it to be answered.

Mr. Calkins: I will withdraw the question, if Mr. O'Connor will sit down.

Q. Mr. Condon, I will ask you whether at this meeting which you say was called together at 11 o'clock a. m. on that day, Miss Whitney was present?

A. She was.

Q. By "Miss Whitney", I refer to Miss Charlotte A. Whitney, who sits at the right of Mr. Harris, the defendant in this case.

A. Yes.

Q. Do you recognize the defendant as the Miss Charlotte A. Whitney who was present at that meeting?

A. Yes, I do.

Q. She was there during the time you were there?

A. Yes, she was.

Q. Will you state what occurred at the meeting from the time of its being convened?

Mr. Pemberton: Same objection.

The Court: Overruled.

A. The meeting was called to order by a man named Tobey, C. A. Tobey, who was installed as temporary chairman. Now, a great many things happened, and I may not get them in the exact order that they happened, but at about this time there were copies of a song passed out, on a mimeographed piece of manila paper.

Mr. Pemberton: Objection, not the best evidence, anything that was in a paper. Have you got a copy of that song with you?

A. Yes, I have.

Mr. Calkins:

Q. You have got a copy of that song with you?

A. Yes.

Q. Did you receive that copy of the song there at that meeting?

A. This was the copy I held in my hand during the singing of the song.

Q. How did you come to get the copy of that song?

A. That was handed to me with the others in the row where I stood.

Q. Have you got that with you?

A. I have.

Q. May I see it?

A. Yes.

Mr. Calkins: I ask that this be introduced as "People's Exhibit for identification".

The Witness: At this time I would like to have the Court make provision for the return of the song at the end of the trial.

[Vol. 122] The Court: It will be returned after this case has been concluded. May be admitted.

Mr. Pemberton: It is not admitted in evidence?

The Court: No.

Mr. Calkins: I offer it for identification, and I propose to offer it in evidence but I think it would save time and talking if I did not yet.

Q. Mr. Condon, you say that a man by the name of Tobey, I understood you to say, was selected as temporary chairman?

A. Yes.

Q. How was this done?

A. Well, more or less by popular acclamation; everybody seemed to be well acquainted with everybody else. They all shouted for Comrade Tobey.

Q. Did Comrade Tobey take the Chair?

A. He did.

Q. Did they then convene the meeting?

A. Yes, he convened the meeting, and I believe that is as far as I can go on that question.

Q. Do you recollect, in general, what he said in convening the meeting?

Mr. Pemberton: Objected to as hearsay.

The Court: May be overruled.

Mr. Calkins: The defendant was present.

Mr. Pemberton: Are you sure?

Mr. Calkins: Well, the witness so testified. I can only believe my ears.

The Witness: Why, at the time the meeting was convened, the delegates were spread out through the hall, and the hall seated about twice as many as there were present, and Tobey asked them all to come down in front, and made some references that in case of a police raid that they would be better able to protect themselves, and then he said, "We will now hear the report of the Credentials Committee". This Credentials Committee had evidently been appointed——

The Court: Never mind that "evidently."

A. Well, leave out the "evidently."

Mr. Calkins:

Q. Did he state what was the purpose of the meeting?

[fol. 123] A. The purpose of the meeting was, he said——

Mr. Pemberton: Objected to as calling for the conclusion of the witness as to what he said.

Mr. O'Connor: And the old objection is hearsay.

The Court: It may be overruled.

A. The purpose, he said, was the organization of the Communist Labor Party of the State of California.

Mr. Calkins: If your Honor please, we will now offer in evidence "People's Exhibit 2 for identification" as "People's Exhibit 2 in evidence", as being a document handed out by the Communist Labor Party in its State convention at the meeting at Loring Hall in Oakland on November 9, 1919.

Mr. O'Connor: We object to it on the ground that there is not the slightest connection shown between that song and Miss Whitney. There is no evidence that Miss Whitney sung the song, or that she ever saw the song, or indeed that she ever heard the song sung.

The Court: Objection overruled. Let it be admitted and marked "People's Exhibit 2."

Mr. Calkins: We will ask at this time, if your Honor please, to have the permission of the Court to read the exhibit in evidence.

Mr. Calkins: Reading "People's Exhibit 2", being a copy of the song testified to by the witness as having been sung at the opening of this meeting. The air is not given. It is headed "Two New Party Songs".

"Glor—ious, Glor—ious,
We'll make the Bolshevik victorious;
Praise to the plutes, they'r making more of us,
While Gene lies in prison for us all.

Men of thought and men of toil,
Men whose labor tills the soil,
Stand together, tyrants foil,
Rise, Rise, Rise!

Long we've waited in the night,
Working for the dawning light,
Now it's coming, all unite,
Rise, Rise, Rise!

Rise majestic in your might,
Put the coward foe to flight,
Fearless in the cause of right,
Rise, Rise, Rise!

[fol. 124]

Far in Georgia's prison cell,
Lies the Gene we love so well,
Wrest him from that living hell,
Rise, Rise, Rise!

All who right and justice seek,
Burst your bonds, no longer weak,
Unite and Join the Bolshevik,
Rise, Rise, Rise!"

The Court: Just a minute—the bailiff will keep order in the front, and if any demonstration whatsoever is made, remove the persons who engage in it.

Mr. Calkins:

Q. Upon the call of Comrade Tobey, presiding over this meeting of the Credentials Committee, what, if anything, happened?

A. The Chairman of the Credentials Committee then came forward and presented her report, and the Chairman of this Committee was Charlotte Anita Whitney.

Q. The defendant in this case?

A. Yes.

Q. And you saw her at that time?

A. I did.

Q. And heard her present this report of the Credentials Committee?

A. What was that?

Q. And you heard her report this?

A. I did.

Q. The Credentials Committee report?

A. Yes.

Q. Of what did this report of the Committee on Credentials consist?

Mr. O'Connor: Let me suggest that at last we have arrived at something which is pertinent to this case, and there will be no objection to the introduction and production here now of any report presented by Miss Whitney, and we ask the gentleman for the report at this time.

Mr. Calkins:

Q. What was the report?

Mr. O'Connor: We object to that upon the ground that it is not the best evidence. If these gentlemen have the report, let them produce it.

Mr. Calkins:

Q. Do you know that the report was written?

Mr. O'Connor: Well, I assume it was, if it was read. (Laughter)
The Court: Was it read?

Mr. Calkins: I didn't ask whether it was read. I don't know, as a matter of fact.

Mr. O'Connor: No, you asked if it was written. I say it was. [fol. 125] I assume it was because the witness testified that it was read.

The Court: Well, let's find out whether it was written. That's what he wants.

Mr. O'Connor: The witness has just testified that Miss Whitney read the report of the Committee on Credentials. This is your testimony, isn't it?

The Witness: I did.

Mr. O'Connor: Now, I assume it was written.

The Court: Of course, by that, we take it that it was in writing.

Mr. O'Connor: Yes, your Honor, that seems to have dawned upon all of us finally. Now we call for it.

Mr. Calkins:

Q. Did you see this report in writing?

A. Not closely, no, sir.

Q. Of the Credentials Committee?

A. Only in the hands of the defendant as she stood before the body and read it.

Q. Did Miss Whitney read from a paper, a report?

A. She did. Some time back I was asked to tell what transpired at this meeting. If I can continue the answer to that question, I think we could tell what the contents of the report is, as I remember it.

Mr. O'Connor: We suggest that the District Attorney conduct the prosecution in this case. You will have an opportunity to tell all that you saw there, but we want the report now, if the gentlemen have it.

The Witness: I see.

Mr. Calkins: I have some papers which I will show the witness.

The Witness: Your Honor, may I speak to Fenton Thompson?

The Court: No, not yet.

Mr. Calkins: Do you want to see this, Mr. O'Connor? You might perhaps stipulate that that is the report.

Mr. O'Connor: I will certainly stipulate that is the report if you say so.

Mr. Calkins: I am asking you about it. I will ask you whether you will stipulate that that is the report. I haven't looked at it, but the witness is prepared to state what it contains, I assume.

[fol. 126] Mr. O'Connor: I had not seen it. Well, there is one paper in this bunch that Miss Whitney's name is attached to, and you are quite welcome to it.

Mr. Calkins: What was that?

Mr. O'Connor: I said that there is but one paper there to which Miss Whitney's name is attached, or which has any reference to Miss Whitney whatsoever, and as to that paper, we are perfectly willing that it should be introduced in evidence.

Mr. Calkins: But you are not willing to stipulate that this is the report of the Credentials Committee?

Mr. Pemberton: I suppose it speaks for itself, doesn't it?

Mr. O'Connor: No, we are not.

Mr. Calkins: I thought you were. You are willing to stipulate to this first page?

Mr. O'Connor: As to that first page, yes, that first page has to do with Miss Whitney, but the others are not in her handwriting. Not that we have any objection to the substance of them.

Mr. Calkins: I understood that if I showed them to you that you would stipulate to them.

Mr. O'Connor: I will stipulate to anything, if your Honor please, that is in the handwriting of Miss Whitney, or that Miss Whitney has had anything to do with. The only thing that I am protesting about is that they are dragging in a lot of things that Miss Whitney has had nothing to do with, and I say to these gentlemen that there will be no objection to anything that has her name attached.

The Court: I thought you were stipulating—no further talk—I thought perhaps you were going to stipulate, but you are not stipulating, so let's go ahead and proceed with the proof.

Mr. O'Connor: We will stipulate, your Honor, to anything that has any connection with Miss Whitney all through this case.

The Court: I don't want to hear that. I want a stipulation entered into if you want to make it, but I don't want to hear any more of that talk.

Mr. Calkins:

Q. I will ask you whether you saw a report yourself?

A. Only in the hands of the defendant as she stood before the meeting.

[fol. 127] Q. You did not have an opportunity to closely examine it?

A. No, sir, I did not.

Mr. Calkins: At this time, if your Honor please, we will offer, as "People's Exhibit 3," the sheet stipulated to by Mr. O'Connor.

The Court: What do you desire it to be marked?

Mr. Calkins: "People's Exhibit 3."

The Court: Let it be marked "People's Exhibit 3."

Mr. Calkins:

Q. Referring to "People's Exhibit 3," headed Communist Labor Party, successors to Local Oakland Socialist Party, 1020 Broadway, Phone Oakland 5493," with something which seems to be a seal on the left-hand side showing "Socialist Party Workers of the World Unite."

"Oakland, Cal., Nov. 8, 1919.

California Communist Labor Party Convention, Loring Hall, Oakland, California.

GREETINGS, COMRADES:

This is to inform you that Local Oakland, Communist Labor Party, with 286 members in good standing, has elected the following sixteen comrades to sit in this convention in accordance with the convention call i. e. one delegate for each local and one additional delegate for each 25 members in good standing:

1. Mrs. Gertrude Warwick,
2. John G. Wieler,
3. John E. Snyder,
4. Eleanor Wondland,
5. Helen Walker,
6. Forrest Walker,
7. Louis N. De Vinney,
8. John R. Noyes,
9. Carl Carden,
10. John Bucanan,
11. C. Alward Tobey,
12. Miss Anita Whitney,
13. Norman H. Telentire,
14. Paul C. Bickel,

15. P. B. Cowdery; Alverson, alternate,

16. J. G. Reed.

Faternally yours, J. G. Reed, Secretary."

On the bottom: "Printed on Union Label Paper," and it has some annotations in the margin: "People's Exhibit #11," "Peo. vs. Whitney," "Peo. Ex. 3," apparently having been used on the preliminary examination.

After the reading of the report of the Committee on Credentials, what happened in this meeting, if anything?

A. Well—

Mr. Pemberton (interrupting): To which we save our objection, that it has nothing to do with anything charged, or attempted to [fol. 128] be charged, in the Information.

The Court: It may be overruled.

A. The convention then proceeded to the appointment of a number of committees, convention committees. There was a Press & Propaganda Committee, and a Ways and Means Committee, and a Resolutions Committee, to which Miss Whitney was appointed, and a Constitution Committee. I believe there was one more—I cannot think of it now. At any rate, Miss Whitney was a member of but one, the Resolutions Committee.

Mr. Calkins:

Q. Were there any speeches made during this morning session?

Mr. Pemberton: To which we object, unless it is shown that Miss Whitney was present.

The Court: It may be overruled.

A. Well, there were, of course, several people had the floor and talked at different times, but in reference to what you would call a full-fledged speech, that was made by Max Bedacht, who was introduced as the Pacific Coast District Organizer for the National Executive Committee of the Communist Labor Party.

Mr. Calkins:

Q. I will ask you, to save Mr. Pemberton's objections, whether or not Miss Whitney was present—meaning the defendant in this case—during all of this morning session?

A. She was.

Q. Do you remember what was the substance of Mr. Bedacht's speech?

A. He told of the work of organizing the body, and he told of a recent trip, or a recent time when he had been at Santa Cruz and had met a rival organizer of one of the other parties, of one of the other three parties that grew out of the split last May, and told of the organization, and stated how he was very sorry that they could not unify the three parties, and was doing everything in his power to unify them. However, he did not believe that this wing should

give in anything to the other wing. There was—of the three parties in the field, there was the Socialist Party, the remnant from which the other two sprang, the Communist Party and the Communist Labor Party, and he said at one time, I remember, “You must not [fol. 129] confuse the Communist Labor Party with the Communist Party, they are not half so radical as we.”

Q. Did he in any way characterize the Communist Labor Party?

Mr. Pemberton: Objected to as calling for the conclusion of the witness.

Mr. O'Connor: And slightly leading.

The Court: “Characterise”—you might change the form of your question, Mr. Calkins. The objection may be sustained. Will you read the question, Mr. Reporter?

(The Reporter reads the question.)

Mr. Calkins:

Q. Did or did not the speaker, Max Bedacht, discuss the Communist Labor Party?

Mr. O'Connor: Object to the form of the question as leading, your Honor.

The Court: It calls for a discussion; “Did or did not he discuss” is the proper form.

Mr. O'Connor: If your Honor please, we object to the form of the question as leading, because it suggests the answer. The only thing he is entitled to ask is “What did Max Bedacht say?” That is what enabled him to follow this question, if he has already suggested the answer in the question.

The Court: I don't know that he has.

Mr. O'Connor: Has your Honor overruled the objection?

The Court: Yes, I did; I have done so, Mr. O'Connor. Have you completed your question? I understand there was an interruption.

Mr. Calkins: I completed the question, your Honor.

The Court: Read the question, Mr. Reporter, and see whether we have all gotten the question.

Mr. O'Connor: Will you kindly read the question, Mr. McSorley?

(The Reporter reads the question.)

Mr. Calkins: That question was objected to, and the objection was sustained, and was followed by another question, wasn't it?

(The Reporter reads the last question.)

The Court: Answer that question.

Mr. Pemberton: “Yes” or “No.”

[fol. 130] A. He did.

Mr. Calkins:

Q. What did he say?

A. Well, he told, that is, he expressed impatience—

Mr. O'Connor: Same objection.

The Court: It may be overruled.

A. He expressed impatience with the old Socialist Party that——

Mr. Pemberton: Move to strike out the answer as the conclusion of the witness. The question is "What did he say?"

The Court: Go ahead—state what he said rather than what he expressed.

A. Your Honor, I cannot give the exact words.

The Court: You are not expected to, but give the substance as much as you can. You will be permitted to give the substance. Proceed.

Mr. Calkins: It is pretty hard for the witness and the Court and counsel, when a continuous objection is made by counsel on the other side, but I think he was trying to answer.

The Court: Proceed.

A. (Continuing:) He told that the progress of the Socialist Party made during the years it has been organized was very slow because they have attempted to make—to work only at the polls, and he urged that with the organization of the Communist Labor Party all over the United States that steps be taken to introduce agents of the party into existing labor unions, in an effort to swing them to their belief. He believed, or he said that he believed, that the action at the polls was too slow; that the working—that the present government is entirely controlled by the agents of the capitalistic class, and they could not hope to gain their ends through the agency of this government.

Mr. Calkins:

Q. You stated a moment ago that in his speech Mr. Bedacht referred to a conversation that he had with a member of the Communist Party in Santa Cruz. What did he say about that in his speech if anything?

A. Well, he merely told how he talked and tried to convince this agent of the Communist Party to swing—to use his efforts to swing the Communist Party back into line with the Communist Labor [fol. 131] Party, and that they had had a friendly discussion in regard to the two parties, and in the course of which this agent that he was conversing with attempted to have him swing the Communist Labor Party to the Communist Party, and so he said that he told this Communist agent that he would be very glad to see them go together but he would not give in an inch on their ultra liberal program, as he mentioned, or ultra radical or more radical program, to give in for the added strength of having the Communists with them.

Q. Did he say anything in this conversation with the supposed delegate from the Communist Party at Santa Cruz with respect to conditions in Germany?

Mr. O'Connor: We object to that as grossly leading and suggestive, if your Honor please.

The Court: He is referring to the subject.

Mr. O'Connor: Just consider for a moment how far afield we are going to convict Miss Whitney than is permitted in the evidence here, or by the evidence. Here is a conversation out of the presence and hearing of Miss Whitney, by Max Bedacht, with a man in Santa Cruz.

The Court: No, no—

Mr. O'Connor: Oh, yes, yes, your Honor—pardon me.

The Court: No, the question goes to the statement and speech—in regard to the full-fledged speech, as he put it, made by Bedacht to the assemblage there, in which he testified that Miss Whitney was there.

Mr. O'Connor: No, your Honor, a conversation held with Mr. Bedacht, by Max Bedacht with a man in Santa Cruz.

The Court: No, Mr. O'Connor, as he gave it to this assemblage, as I understand the answer.

Mr. O'Connor: This other question is hearsay we are, however, now concerned with.

The Court: Read the question again, Mr. Reporter.

(The Reporter reads the question.)

The Court: I don't quite understand that question.

Mr. Calkins: I will withdraw that question, then, your Honor.

The Court: I think you should.

[fol. 132] Mr. Calkins:

Q. What else did he say in his speech, if anything?

A. He discussed conditions in Germany, as he had heard they were on a recent visit, I believe he said. He told of the organization of the radicals there, and of how they had little difficulty in teaching there the principles of radicalism until the police got after them, and that then their forces were weakened.

Mr. O'Connor:

Q. Did he say police or German military forces? If your Honor please, I object to this.

The Court: Go ahead.

A. That was about all that it was about.

Mr. Calkins:

Q. What else, if anything, happened in the morning session of this meeting?

A. Well, the committees were completely appointed, and then at about 12 o'clock, or 12:30 I believed it was, they adjourned with the understanding that they were to re-adjoin at 2 o'clock, and that in the meantime the committees were to have met in the hour between 1 and 2.

Q. You gave us a copy of a song that was sung in this convention at the morning session. Was that the only song sung?

A. Those were two different songs. They were both sung.

Q. Any other songs?

A. No, that was all.

Q. Was there any other?

A. The songs were led by a man named Taylor, who acted as temporary secretary of the organization, John C. Taylor.

Mr. Ponderton: We move to strike out the answer as not responsive to the question.

The Court: It may be denied.

A. (Continuing:) And following the singing of the songs, they all stood.

The Court: You were asked about the singing of certain songs—let's have that question.

A. I believe it was what happened after the singing of the songs.

The Court: Let's see if that is it.

Mr. Collins: I will give him the question, to save time.

The Court: Well, let's have the question, now, as we will have that we go. Any other song—the answer may go out. Your answer is good.

[Id. 133] Mr. Ponderton: Just a minute—just a minute—any other song, and give us what followed, Mr. Reporter.

(The Reporter reads questions and answers.)

The Court: That answer may be stricken out, and the answer that it be stricken from the record may be granted.

Mr. Collins:

Q. What, if anything, followed the singing of the songs?

The Court: Now your question may be answered.

A. While they were standing, singing the song, they gave three cheers for the Bolshevik, quite vociferously given.

Mr. Collins:

Q. Anything further happen before the adjournment than that which you have already testified to?

A. No, sir, I believe not.

Q. When the adjournment was taken, was there any arrangement made for the reconvening of the session?

A. Yes, they were to reconvene at 2 o'clock, and the committee was to meet in the hour between 1 and 2.

Q. What did you do then?

A. After the adjournment.

Q. Yes.

A. Why, I went to one of the local restaurants with that House and Propaganda Committee, and had lunch in there, and in pretty Communist style, everybody paid for their own.

Q. Did you all return to the convention?

A. I did.

Mr. Pemberton: Is that revolutionary?

The Witness (continuing): I did later, after lunch. Before lunch was more or less of a meeting of this committee, they were all there, and then the meeting of the committees was continued and the members after luncheon did return to the hall.

Q. I will ask you a question there: Was Miss Whitney a member of this committee?

A. She was not.

Q. Who were the members of this committee?

Mr. Pemberton: Objected to as immaterial.

The Court: It may be overruled. You may answer the question.

A. Well, as near as I can remember, there was Reed, or at least Reed had luncheon with us, and there were one or two that I was [fol. 134] not certain whether they were committee members or not. Snyder was Chairman of the Committee, and that was about all; there were three or four more, but I was not introduced to them, but I would recognize them.

Mr. Calkins:

Q. When you returned to the convention, what happened?

A. Well—

Q. Did you go up to the convention hall?

A. Yes, the meeting was continued in the same hall.

Q. Just let me ask you questions, and you answer them as I ask the questions. Did you go into the same convention hall in which you had been in the morning?

A. We did.

Q. With reference to the description that you gave of the hall as it was when you went there in the morning, did you notice any change there?

A. I did.

Q. Will you state what those changes were?

A. In the morning in the hall a large American flag was hung inside of the bookcase that I mentioned, but there was a large piece of red cloth hung entirely across the bookcase so that the American flag was no longer visible.

Q. Was Miss Whitney present, the defendant in this case, during the afternoon session of this convention?

A. She was.

Q. During all of it?

A. No, I believe not.

Q. During all of the session while you were there?

A. No, sir, she was not; she did not come in, she was not there at the opening of the afternoon session on account of the fact that the Resolutions Committee, on which she served, was a little slow in getting through with its work than the other committees.

Q. Did she later come back to the convention?

A. She did.

Q. About what time did she come?

A. Well, in reference to events that were taking place, instead of the clock, I believe she came in right after the report of the Press Committee was read—that was the first report given.

Q. Going back, now, to the time at which the convention reconvened, what happened in the course of the convention?

Mr. Pemberton: The objection, your Honor, on the ground that it appears that Miss Whitney was not there, and incompetent, irrelevant [fol. 135] and immaterial, therefore.

Mr. Calkins: That answer to that objection is that this is connected with the Communist Labor Party organization.

Mr. Pemberton: You want to try her for what somebody else did, then.

The Court: Overruled. You may answer.

A. Snyder, who was Chairman of the Press and Propaganda Committee, presented the report of that committee. That was framed during the noon recess. This report provides or urged—

Mr. Pemberton: I make the objection as not the best evidence and not responsive to the question.

The Court: Have you the report?

Mr. Calkins: I don't know.

Q. I will hand you the platform, or pages of paper, and ask you if you know what those are?

A. This is the report of the Press & Propaganda Committee that was drawn up in the office of the "World" during the noon recess.

Q. Were you there when it was drawn up?

A. I was, only it appears in this copy, this is the original, that paragraph two has been marked out, and I don't believe—I believe that was part of the report that was read, and that it was not marked out at the time of the convention.

Mr. Calkins: We will ask, if your Honor please, that this be introduced in evidence as "People's Exhibit No. 4."

Mr. Pemberton: The objection is that it appears from the testimony of the witness that Miss Whitney was not present, or was not on the committee and was not present when the report was brought in.

The Court: It may be overruled, and it may be admitted and marked "People's Exhibit No. 4."

Mr. Pemberton: Is that in evidence, your Honor, now? I am only asking this for information—is that introduced in evidence?

The Court: Offered in evidence, and so admitted.

Mr. Pemberton: I wanted to make sure whether it was offered in evidence or for identification.

The Court: In evidence, I understand.

[fol. 136] Mr. Calkins: Yes.

Mr. O'Connor: As long as it is introduced in evidence, why not read it to the jury?

Mr. Calkins: I certainly expect to. (Reading:)

"Oakland, California, Nov. 9, 1919.

Report of Press and Propaganda Committee of the Communist Labor
Party Convention

Session Held at Loring Hall, 531 11th St., Oakland, Cal.

"We recommend:

1. That the State Executive Committee issue a Party Bulletin monthly giving the local and State activities and such other information as pertains to help building the party. Said Bulletin to be published in *The World*. We also recommend that *The World* be designated as the official organ of the Communist Labor Party of California, and that a resident member of the State Executive Committee be a member of *The World* Committee. It is recommended that each Local subscribe for their entire membership at the rate of \$1.50 per member. This to be voluntary on the part of the Locals.

2. That the Communist Labor Party of California get behind the movement for a daily labor paper, and that we urge every local in the organization to immediately appoint a daily press committee, for the purpose of aiding in any capacity necessary for the establishment of said paper.

That a committee be elected from this convention to draw up plans for raising funds, securing data, and general information, and to report same to the assembly of those interested in a daily paper to be held at Loring Hall, Saturday, Nov. 15, 1919.

We recommend that speakers and solicitors for stock for the establishment of a daily be sent out by the State Executive Committee among the communist membership and other radical organizations, unions, etc., and that these be very carefully selected from among men and women who can both speak and execute business at the same time.

3. We recommend that in case a Labor Committee is elected by this convention that they organize a publicity bureau for the propagation of the O. B. U., Shop Stewards, and communism for the labor [fol. 137] press and other semi-radical organizations, and that this Bureau also prepare leaflets, booklets, etc., upon said subjects, and that provisions be made to finance such movement and that the Labor Committee be empowered to act jointly with the State Executive Committee to raise said finances. We further recommend that each Local appoint shop stewards for as many locals of labor organizations as it is possible to procure to spread our propaganda.

4. We recommend a uniform State literature department under the supervision of a regularly appointed librarian. His duty shall be, among other things, to establish libraries and literature depart-

ments or stores in every branch or local in the state, and also to get socialist and communist literature upon news-stands and in public libraries.

5. We recommend that the State Executive Committee appoint a committee for the preparation of leaflets, pamphlets, and news articles for the press.

6. We recommend that, inasmuch as transportation rates from the East are prohibitive in price, a centrally located pub. house should be established on the Pacific Coast to supply the needs of the Western States for propaganda matter.

7. We recommend a State Lyceum Bureau to be connected in its activities with the National Lyceum Bureau of the Communist Labor Party."

Mr. Pemberton. Would you kindly inform me what pertinency that which appears upon the back of that bears to the issues here?

The Court: That is "People's Exhibit 4," Mr. Rudolph, admitted while you were absent.

Mr. Pemberton: Mr. Calkins, there is something on the reverse side of that.

Mr. Calkins: Yes, Mr. Pemberton, there is. Do you want read what is on the back of this? You see, some of these are written on pieces of old paper. This appears to be a letter signed by H. C. Tuck, Chairman. If you want to read it, you are at liberty to do so.

Mr. O'Connor: Well, in other words, you are not introducing that on the back?

Mr. Calkins: I am introducing the report of the Committee only.

[fol. 138] Mr. Pemberton: This on the back is not admitted, then?

Mr. Calkins: I don't know what you are talking about.

Mr. Pemberton: Well, this on the reverse side of the exhibit.

Mr. Calkins: Well, that old letter of some other organization has not been introduced, no, but the report of the Press and Propaganda Committee is already introduced.

Q. Who read this report?

A. J. E. Snyder. He is chairman of the Committee, and editor of "The World," the paper that is mentioned.

Q. You personally know Mr. Snyder, do you not?

A. Yes.

Q. And you know he is editor of "The World"?

A. Yes.

Q. When did Miss Whitney make her first appearance in that afternoon meeting of the convention?

A. Just shortly after this report was presented; in fact, I don't believe there had been any business transacted after the report of the Press Committee, before she came in with the other members of the Resolutions Committee, and presented their report. She did not present the report of this committee, but she was one of the committee, however.

Q Did these committees, all of them, report in the afternoon?

A. They did.

Q. Was there any action taken on the report?

A. I could only say with regard to the Press & Propaganda Committee, because, following the adoption of the report of the Press & Propaganda Committee, it was made a rule of order that all of the reports of all the committees be heard before any of them be acted upon.

Q. Was the report of the Press & Propaganda Committee acted upon?

A. Yes, it was. That was adopted.

Q. Was that report adopted?

A. It was, yes.

Q. Do you know whether or not the recommendation that "The World" be made the official paper of the organization was acted upon at that convention?

A. That was adopted with the report, yes.

Q. Were there any discussions during the afternoon in the convention as to its operation?

A. Well, there were several of the ladies spoke, objecting to the "Hallelujah" methods of the morning when the songs were sung. [fol. 139] That was about all.

Mr. Pemberton: What was that answer?

A. There were several of the ladies—

The Court: Read the answer, Mr. Reporter.

(The Reporter reads the answer.)

The Witness: You understand "Hallelujah" is quoted from their talk, not mine.

Mr. Calkins:

Q. They were objecting to the songs?

A. Yes.

Q. Did they make any suggestions as to what might be done in the place of singing songs?

Mr. Pemberton: Objected to as leading.

Mr. Calkins: It is following your question.

The Court: Overruled.

A. In their talks, they urged that more action be used.

Mr. O'Connor: What do you mean by that?

Mr. Calkins: You were asleep.

Mr. O'Connor: No, I was not asleep. Who do you mean by "they"? Miss Whitney?

A. I could not say about Miss Whitney, but there were several of the ladies, I said.

Mr. O'Connor: I heard that.

A. "Several of the ladies," I said.

Mr. O'Connor: I heard that, but you don't know who they were?

A. No, sir. I didn't. They urged more definite action be taken, that they follow out the words that are used in their Communist Manifesto; that it is an organization of deeds, and not of words, and—oh, along the line of more action and less words—nothing very definite was said.

Mr. Calkins:

Q. What was the next committee that reported, if you remember?

A. I am not sure about the order, but inasmuch as none of them were acted upon before they were all given, the Resolutions Committee—then the Ways and Means Committee, I believe was next, and then the Constitution Committee.

Q. Do you know who presented the report of the Resolutions Committee?

A. No, sir, I do not.

Q. Do you know who the members of that committee were?

[fol. 140] A. No, sir, I do not know, aside from Miss Whitney; I know she was a member. I believe she was the only lady upon it; then there was another—Yes, Weiler, J. G. Weiler, or Weeler, he was a member of this committee.

Mr. O'Connor: I will say to the District Attorney, Mr. Harris, assured me that the resolutions, all of them, are signed by Miss Whitney, and as to their introduction in evidence, we have no objection at all.

Mr. Pemberton: Except the general objection that it has no connection with anything charged in this Information.

Mr. O'Connor: Well, that goes all the way through. We wish the Court to go all the way through.

The Court: That objection may be overruled, and you may proceed.

Mr. Calkins:

Q. You stated that a report was made by the Constitution Committee, did you not?

A. Yes, I did.

Q. What action was taken upon that report?

A. I could not say because I left during the reading of this report.

Q. Was there any action taken upon it before you left?

A. Yes, there was; the report of the Constitution Committee naturally was a sample constitution for the organization. This was read all the way through first, and then it was taken up section by section, and I stayed there while about the first—about the first three or four sections were voted on. Those sections that were voted on while I was there met with the approval of the convention. Then I left.

Q. Now, you will remember that in the report of the Press & Propaganda Committee there was a recommendation with respect to the publication of certain propaganda. Was there any discussion in the meeting on this recommendation?

Mr. O'Connor: Objected to as leading, if your Honor please, and suggestive.

The Court: Overruled.

A. Well, on this—you mean discussion on this report before it was acted upon?

Mr. Calkins:

Q. Before or after.

A. Yes, I believe there was—to the effect that the cost of bringing [fol. 141] ing this publishing material out here from the East was too expensive, and that they could do it cheaper by re-printing them out here, and that the effect would be better, anyway, to have their publication printed out here, and there was no opposition to the adoption of this report as expressed upon the floor.

Q. During the course of the meeting in the afternoon, Mr. Condon, was there any question raised about the subject of industrial unionism?

Mr. O'Connor. Just a moment—now, if the Court please, we object to that as leading, and I assume the same ruling will be made, your Honor.

The Court: Well, directing the witness's attention to a subject, I do not think is leading.

Mr. O'Connor: Well, listen to the question, your Honor: "Was there anything said about so-and-so?"

Mr. Calkins: I put a general subject, though.

The Court: Why, of course, it is a general direction to the witness. You may answer "Yes" or "No."

A. There was, yes.

Mr. Calkins:

Q. What was that?

A. Well, they discussed the principle of industrial unionism as an opposite to trade unionism, industrial unionism being an organization of the workers along the lines of a complete industry rather than a complete trade, and I believe that is quite generally the understood distinction, and they said the trouble with the—that is, these speakers said, these several speakers, none of whom I know or remember their names, said industrial unionism was the one means by which they could accomplish their purpose; that the trade unionism had failed, and that when the time came to strike at the heart of capitalism they did not have the machine that would work, and that the only organization along the lines of industry, that is, along the lines of trade, would be effective. In this connection, one of the speakers praised the I. W. W., inasmuch as that is the form of organization of workers that the I. W. W. advocated.

Mr. Pemberton: Please read that, Mr. Reporter. (The Reporter reads the last part of answer.) I move to strike out that as not [fol. 142] responsive to the question, and incompetent, irrelevant, im-

material and not in the least binding upon Miss Whitney. I would hate to be bound by some things that have been said by some people at conventions that I have attended.

The Court: It may be overruled.

Mr. O'Connor: That is one of the penalties of being a Democrat. Our same objection goes to all this line of testimony.

The Court: Yes, the objection, as I understand it, is the same objection to this question as to the other one.

Let us have a five-minute recess. You are admonished at this time, ladies and gentlemen of the jury, not to converse among yourselves, or with any other person, upon any subject connected with the trial of this case, or to form or express an opinion thereon until the case is finally submitted to you. Five minutes. Let the officers be sworn.

(Officers sworn to take charge of jury.)

After Recess

11.40 a. m.

The Court: People against Whitney.

Mr. Harris: Ready, your Honor.

The Court: Counsel will stipulate, will they, that all the jurors are present?

Mr. Calkins: We so stipulate.

Mr. O'Connor: So stipulate.

Mr. Calkins:

Q. During the course of the meeting, was the process of organization of the Communist Labor Party taken up by any speakers?

Mr. Pemberton: Objection, as leading.

The Court: Overruled.

Mr. Calkins:

Q. Please answer "Yes" or "No."

A. Yes, it was.

Q. By whom was it taken up, if you remember?

A. It was a part of the report of the Constitution Committee that was read at the meeting.

Q. Did it have—I withdraw that. What was the substance of this discussion?

A. The discussion?

[fol. 143] Q. (Continuing:) Of the organization of the Communist Labor Party.

Mr. Pemberton: The objection is, your Honor, that it does not appear that there was any discussion. He said it was a part of the report, and the report will speak for itself, certainly.

Mr. Calkins: I will ask the question.

Q. Was there a discussion of the organization of the Communist Labor Party and its origin?

A. Yes, there was, that were a part of, and inasmuch as this was a new party being formed, this discussion ran all through the meeting on the method of how the party had originated. There were several references to it in Bedacht's speech.

Q. Who?

A. In Max Bedacht's speech.

Q. What was said in that speech?

A. That was in regard to the Chicago convention there, how the delegates went to the Chicago convention, and how the old conservative element of the Socialist Party saw or had learned that there were a great many radicals there than there had been in the previous meetings, and that they determined to keep control of the party in spite of that, so when the radical delegation—that is, you know, the radical people unofficially appointed—however, when they arrived, the old-wing Socialists had the police throw out the radicals, and so the radicals were all there in Chicago, and they went to another hall and formed this Communist Labor Party, and I believe it was at another subsequent sifting of this Chicago convention of the Socialist Party that the Communist group was thrown out, then they formed their party as well.

Q. Did Mr. Bedacht state in his speech whether or not he had attended that meeting?

A. He did.

Q. That is, I refer to the Chicago meeting.

A. The Chicago convention. He was one of those that went over to the Communist Labor group that was denied admission to the place by the police.

Q. Did any other speaker discuss the organization of this party?

A. I don't remember any specific instance; as I say, there were a great many, probably a great number of different speakers had the of introducing their agents into the existing trade unions, was one [fol. 144] of the great points in order to swing the union to their side of the belief.

Q. Do you know whether or not the persons at the convention were all from the City of Oakland?

A. They were not, no, sir.

Q. Do you know where they were from?

A. There were sixteen from San Francisco, sixteen from Oakland, and there were smaller numbers from San Jose, Santa Cruz, Fresno and Lodi, one from Richmond, and another group of about twelve from Dimond, in Oakland; they had a separate organization up there.

Q. Was there any mention of Southern California?

A. There was not, no; in regard to Southern California, one of the members that spoke explained that down there the Socialist Party, you see, in all of those cities—

The Court (interrupting): State what he said, not what you think.

A. This is all what he said.

The Court: I thought you were getting off on some tangent.

A. This was explained at the meeting, that in all of the cities that were represented at this convention, splits of the local parties had not taken place along the lines of the Chicago parties then it was

explained that the Southern California Socialist Party had not taken this local action in regard to, or along the lines of the Chicago convention.

Q. But that these other parties had?

A. Yes, they had.

Q. About how many were there at this convention all together?

Mr. Pemberton: Just a minute. The question has been once answered; the question has been answered and he said there were about a hundred there.

Mr. Calkins: I will withdraw the question. Perhaps he has testified to that.

Q. Were there any women present at this meeting, besides Miss Anita Whitney, the defendant?

A. Yes, there were; there must have been about—oh, twenty-five, or so. They were—I couldn't say whether they were delegates to the convention or whether they were wives or relatives of those of the [fol. 145] delegates there. But there were quite a few there.

Mr. Calkins: At this time, if your Honor please, we will ask to introduce in evidence as the People's next exhibit, the report of this Committee on Resolutions, of which the witness has testified Miss Whitney was a member.

Mr. Pemberton: We save our general objection to it, that it has nothing to do with any issue raised by the Information at all. We make no other objection.

The Court: Very well, then. Let that objection be overruled.

Mr. Calkins: Do you admit the signatures, that this defendant sometimes signed "C. A. Whitney" and sometimes "Charlotte Anita Whitney," differently, and sometimes "C. Anita Whitney"?

Mr. O'Connor: They are all Miss Whitney's signatures.

The Court: This will be admitted as "People's Exhibit 5" in evidence. No. 5 is the proper number, I think.

Mr. Calkins: I desire to read them at this time.

Mr. Pemberton: Do you desire to introduce them in evidence?

Mr. Calkins: That is the request.

The Court: Yes, such will be the order, "People's Exhibit 5" in evidence.

Mr. Calkins (reading):

"The C. L. P. of California fully recognizes the value of political action as a means of spreading communist propaganda; it insists that in proportion to the development of the economic strength of the working class, it, the working class, must also develop its political power. The C. L. P. of California proclaims and insists that the capture of political power, locally or nationally by the revolutionary working class can be of tremendous assistance to the workers in their struggle of emancipation. Therefore, we again urge the workers who are possessed of the right of franchise to cast their votes for the party which represents their immediate and final interest—the C. L. P.—at all elections, being fully convinced of the utter

futility of obtaining any real measure of justice or freedom under officials elected by parties owned and controlled by the capitalist class.

[fol. 146] Signed By the Whole Committee. H. L. Griest, Chairman. W. H. Eichhorn, J. G. Wieler, D. D. Wemich, Charlotte Anita Whitney, Edw. R. Alverson."

"Co-operatives & Workers Control

We congratulate the Workers on the stand taken by them in the movement for Workers control of industries as evidenced in the movement known as the Plumb Plan for control & management of the R. R. and also the effort of the Workers generally to eliminate the exploiter by the establishment of cooperative societies.

"At the same time we feel compelled to point out to all Workers that the Labor Problem cannot be solved by any such scheme for only part of the working class, that the labor problem must be settled by all the Workers for all them, and that the only solution will be found to rest in the establishment of a communist labor society which is based upon the collective ownership of all means of production of the working class.

(Signed) K. Bauer, H. L. Griest, W. H. Eichhorn, Edw. R. Alverson, D. D. Wemich, Charlotte Anita Whitney J. G. Wieler."

"Resolved: That we denounce the bloody course of action of the government in carrying on an undeclared war against Soviet Russia, as being in conflict not only with the fundamental law of the land, which requires congressional sanction for warfare upon any people—but also with every rule of decency and honesty.

We demand the withdrawal of all support by the gov. from capitalist interests who are forcing imperialistic wars in any country and recommend that the unwarranted attitude and actions of the government in its relation with Russia, Mexico, Hayti & San Domingo be made a special & vigorous part of the propaganda of the C. L. P.

K. Bauer, D. D. Wemich, H. L. Griest, Edw. R. Alverson, C. A. Whitney, J. G. Wieler, W. H. Eichhorn."

[fol. 147] "The Resolution Committee recommends that the C. L. P. of California extend, through its official channel, a sincere invitation to the Socialist Labor Party and the Communist Labor Party for the purpose of discussing, and, if possible, devising ways and means whereby unity of these organizations may be effected.

Signed by the whole committee.

H. L. Griest, Chairman. W. H. Eichhorn, J. G. Wieler, D. D. Wemich, Charlotte Anita Whitney, Edw. R. Alverson."

"The C. L. of the State of California declares itself to be unpromisingly in favor of industrial unionism, and we recommend

to each local that at all times the combined energies of the comrades be devoted in building up of industrial unions.

Signed by the Whole committee.

H. L. Griest, Chairman. W. H. Eichhorn, J. G. Wieler,
D. D. Wemich, K. Bauer, Charlotte Anita Whitney, Edw. R.
Alverson."

"Resolutions Committee recommends that the C. L. P. use all its strength and energy in the organization and education of new workers to utilize to the full extent their collective power to force the unconditional release of each and every one now serving a sentence as a political or class war prisoner.

H. L. Griest, Chairman. W. H. Eichhorn, Edw. R. Alverson,
Charlotte Anita Whitney, D. D. Wemich, K. Bauer, J. G.
Wieler."

Juror McClymonds: Your Honor, can I have that last one read again?

Mr. Calkins (reading): "Resolutions Committee recommends that the C. L. P. use all its strength and energy in the organization and education of the workers to utilize to the full extent their collective power to force the unconditional release of each and every one now serving sentence as a political or class war prisoner."

[fol. 148] Q. Mr. Condon, were you present when this report was read?

A. The report of the Resolutions Committee?

Q. The report of the Resolutions Committee.

A. I was, yes.

Q. Referring to the report of the Resolutions Committee, on the subject which I have just read, the subject of industrial unionism, was there any discussion of that resolution?

A. No, there was not at that time. You see, this rule of procedure that I mentioned, that they were not to act upon or discuss any of them until they were all heard, and the Constitution Committee was ready to present its report at this time, so they were just laid on the table.

Q. Then were you present when this committee report was acted upon?

A. No, I was not.

Q. You left the convention before that time?

A. Yes.

Mr. Calkins: Now, if your Honor please, we are going off on a different line of testimony with this witness, and it is now one minute to twelve, and may we take the usual noon recess at this time?

The Court: I think we had better do so at this time. Ladies and gentlemen of the jury, you are admonished at this time not to converse among yourselves or with any other person upon any subject connected with the trial of this case, or to form or express any

opinion thereon until the case is finally submitted to you. Let the bailiffs be sworn.

(Officers sworn to take charge of jury, and a recess taken until two o'clock p. m.)

Afternoon Session

The Court: People against Whitney. Call the District Attorney.
(District Attorney called.)

The Court: Will counsel stipulate that all the jury are present?

Mr. Calkins: The People will, yes, your Honor.

Mr. O'Connor: Yes, your Honor.

ED CONDON recalled.

Direct examination resumed.

Mr. Calkins:

[fol. 149] Q. Mr. Condon, I will ask you whether there are in the court room at the present time any persons whom you recognize as persons who were in attendance at the meeting of November 9, 1919, at Loring Hall?

A. There are, yes.

Q. Will you point those people out?

A. You don't care for the ladies, do you?

Q. Anybody.

A. This gentleman sitting over here with the glasses on.

Mr. Harris: Your name?

A. Dolsen.

Mr. Harris:

Q. Mr. James A. Dolsen?

The Witness: I am not acquainted with him.

Mr. Harris: Will you stipulate that that is the gentleman to whom he is referring?

Mr. Pemberton: We are not responsible for that gentlemen; we don't know him.

Mr. O'Connor: I will state to you if he said his name is Dolsen, I will take his word for it.

The Witness: And sitting alongside of him, Mr. Bedacht and Mr. Smith and Mr. Taylor and Mr. Wieler.

Mr. Harris: Just a second, please. What is your name?

A. Max Bedacht.

Mr. Harris: And the gentleman next to him?

The Witness: Mr. Smith, Edric B. Smith, and Mr. Taylor—yes, J. C. Taylor.

Mr. Harris: Mr. John C. Taylor?

The Witness: And Mr. Wieler. That is all I see right now. There were more than this this morning, at this morning's session, but I don't see them all here.

Mr. Calkins:

Q. Did all of these people——

Mr. O'Connor (interrupting): You were asked for all of the people, were there ladies present there?

A. Yes, there were.

Mr. O'Connor: Will you kindly pick them out? Don't slight the ladies.

The Witness: Oh, I will be glad to. Let me see—some of the ladies down in here—Mrs. Alverson, I believe—here—she is the only one I see here that I remember.

[fol. 150] Mr. Calkins:

Q. Those whom you have named by name from the stand you personally recognize, do you?

A. Yes, they were present.

Q. The gentlemen whom you have pointed out participated in the meeting of November 9, 1919?

A. Yes, more or less. Mr. Bedacht was the principal speaker, as I have testified.

Q. And Mr. Taylor, did he play any part in the meeting?

A. Mr. Taylor was the secretary.

Q. I will ask you, Mr. Condon, whether at any time subsequent to the 9th day of November, 1919, you visited Loring Hall?

A. Following that day, yes, twice.

Q. When was the first time, subsequent to the 9th day of November, 1919, that you visited the Hall?

A. That was the following Wednesday; the 9th was a Sunday.

Q. And you visited it again on Wednesday of the week ensuing?

A. Yes.

Q. November 12th, that would be?

A. Yes, that was the date. The day after Armistice Day.

Q. Did you recognize any persons present at that time?

A. In what way do you mean?

Q. Did you know any of the persons who were present at that time?

A. Mr. Reed is the only one I remember.

Mr. O'Connor: Was Miss Whitney there, may I ask? Just a minute. Just a minute. We object to anything that occurred on the 12th day of November, unless it be shown that Miss Anita Whitney was present, as having been things done out of the presence and hearing of the defendant.

Mr. Calkins: If your Honor please, our answer to that objection is that we propose to connect this with the Communist Labor Party.

The Court: It may be overruled; you may answer.

Mr. Pemberton: It hasn't the slightest tendency to connect it with Miss Whitney.

Mr. Calkins:

Q. You say you saw Mr. Reed present?

A. Mr. Reed was present.

Q. Is that Mr. J. G. Reed, that you refer to as having been present at the former meeting?

A. Yes.

[fol. 151] Q. Did you have anything to say or do with Mr. Reed on that occasion?

Mr. O'Connor: If your Honor please, we object to that on the ground that it is hearsay. How can anything that this witness had to do with Mr. Reed concern Miss Whitney?

Mr. Calkins: Our point is that it had to do with the Communist Labor Party, Mr. O'Connor.

Mr. O'Connor: I understand that. But there is a woman named Anita Whitney on trial here, and not the Communist Labor Party. The Communist Labor Party is not on trial here and the Communist Labor Party, as such, is not on trial in any court.

The Court: It may be the theory that what they were doing was in violation of law, for all that I know. It may be overruled.

Mr. Pemberton: I am not defending the Communist Party, nor is Mr. O'Connor. We are defending Miss Whitney.

The Court: Overruled. I made the ruling. I wish you would please cease to argue, Mr. O'Connor. The objection is overruled and you may proceed with the question.

The Witness: What was the question?

The Court: The Reporter will read it for you.

(The Reporter reads question.)

A. It was, yes.

The Court: Just read it again, please, Mr. Reporter.

(The Reporter re-reads question.)

A. Yes.

Mr. Calkins:

Q. What, if anything, occurred?

Mr. Pemberton: To which we object, on the ground that it is incompetent, irrelevant and immaterial, and not connected with this defendant, and I will call the Court's attention to the fact that it was after the matter with which they seem now to be trying to charge Miss Whitney; and anything done afterwards could not relate back to affect her, because she could not help it.

The Court: It may be overruled.

A. At this time, you see what I had to do with Mr. Reed—I purchased some literature from him, that was on sale there.

Q. Can you name what you purchased?

[fol. 152] A. I purchased a copy of a magazine called the Proletarian, and a copy of a magazine called the Gale's.

Q. What was that?

A. Gale's, and a copy of a magazine—a copy of this Communist Manifesto; I bought a second copy at this time.

Q. Just a moment. With respects to that Communist Manifesto, is that the same as the one which was exhibited to you this morning, "People's Exhibit 1" for the Prosecution?

A. It is, yes, and one or two pieces of literature, I forget what they were. I think there were five all together.

Mr. Calkins:

Q. All that you have testified to occurred in the City of Oakland, County of Alameda, State of California?

A. It did.

Mr. Calkins: You may take the witness.

Cross-examination.

Mr. O'Connor:

Q. Mr. Condon, I suppose when you left the meeting of the Communist Labor Party that day, you went direct to the police headquarters, did you not?

A. To the headquarters of the Oakland police?

Q. Yes.

A. No, I did not.

Q. Why not?

A. No, it is this meeting——

Q. From what you observed there, did you feel that a crime had been committed?

Mr. Calkins: Now, if your Honor please, that is not a proper question on cross examination and calls for the conclusion of the witness.

The Court: Sustained.

The Witness: Shall I answer it, or not?

The Court: No.

Mr. O'Connor:

Q. In other words, notwithstanding what you had observed and what you had heard and seen, you did not report it at that time to the authorities?

A. I did not.

Q. You did not?

A. No, sir.

Q. Why not?

A. Because at that time, I had not read, *I had not read* the Communist Manifesto, and in my opinion the Communist Manifesto, if anything, establishes it as a syndicalist organization, I think that does.

[fol. 153] Q. That is the only reason; there was nothing that you heard there in any of the speeches, there was not a word or deed or act which occurred on the 9th of November which led you to believe

that any law had been violated until you read this Communist Manifesto. Is that the fact?

A. Well, there was the draping of the American flag, for instance.

Q. All right, we will come to the draping of the American flag. Do you know a man by the name of Fenton Thompson?

A. I do, yes.

Q. Did Fenton Thompson ever tell you that a plant that he had at that meeting draped that flag?

A. He did, yes.

Q. He did?

A. Yes.

Q. In other words, then, the red flag that you talked about this morning as having been thrown over the American flag was placed there by a dupe that Fenton Thompson had in that convention. Is that the fact?

A. That is what he told me.

Q. Yes. What else did Fenton Thompson tell you?

A. When?

Q. At any time—about that convention, or any other scheme or trick, or dastardly outrage that he had perpetrated?

A. He told me that he, that is, as far as I know of anything that he told me—

Q. Relate the whole conversation that you had with him about planting the American flag under the red table cloth.

A. Well, this was two weeks following; I believe about two weeks following the incident, there was a vast roar in the papers and we were discussing this, and he asked me if this American flag had been draped—some of the newspapers had said it had, and some said it had not, and I was the one who knew, so he asked me if it had and I said yes, it had, with this banner, not a flag; that is, I would say a piece of cloth; in this case it happened to be red. It was more or less of a table cloth, I would say. And he said, "Do you want to know who did that?" I said, "Do you know?" And he said "One of my men."

Q. That was what Fenton Thompson said?

A. Yes.

Q. Where is Fenton Thompson?

A. He is not here just now—is he? There he is.

[fol. 154] Mr. O'Connor: Thompson, will you stand over here, so that the jury may see you?

Q. Is this the man who told you that one of his men draped the American flag with a red banner?

A. It is.

Q. Now, Mr. Condon, will you turn and tell the jury, please, why you did not tell them that this morning?

A. What? That?

Q. That you knew that it was a plant, and that you knew it was a frame. Why didn't you tell the jury that this morning?

A. Because I was not given an opportunity to do so.

Q. Three times you mentioned it.

A. No, I didn't mention anything about knowing that it was a plant.

Q. Let me ask you——

A. (Interrupting.) It was two weeks later that I found out that it was a plant.

Q. You knew it this morning when you were on the stand, didn't you?

A. Yes.

Q. Why didn't you enlighten the jury about it then?

A. I didn't have an opportunity. Read back there in the testimony.

Q. Is that your answer now, that you did not have an opportunity?

A. Yes, it is.

Q. Let me ask you. Are you an American citizen?

A. I am, yes.

Q. As an American citizen, do you approve of the actions and conduct of Fenton Thompson?

A. If what he said about that, about planting that, is true, I do not, no.

Q. But you did not enlighten the jury about that this morning, did you?

A. I did not, no, sir.

Mr. O'Connor: I take it, gentlemen, that the red banner goes out of this case now, altogether, I take it.

Mr. Harris: There is no question about it, Mr. O'Connor. The red banner does go out of this case at this time as far as we are concerned, and I would like——

Mr. Pemberton: This is the same Fenton Thompson who swore to the complaint in this case, isn't it?

Mr. Harris: And Mr. O'Connor, I would appreciate your asking the witness if he ever mentioned that to either Mr. Calkins or myself or anyone else.

[fol. 155] Mr. O'Connor: I would say to you, Mr. Harris, that it is not necessary. Your conduct in this case has been such that it challenges the admiration of every decent man.

Q. Now, you testified on the stand this morning, Mr. Condon, that there was something said about the police. Do you remember that testimony?

A. About what?

Q. About the police.

A. In which way? There was several places where the police were mentioned.

Q. There were several places in which police was mentioned that day?

A. In this testimony.

Q. Yes, but that day?

A. Yes, of course.

Q. Now, your memory has not been refreshed by anything that has occurred recently, has it?

A. In what way do you mean?

Q. Well, your memory was just as good, if not better, it being closer to the time of the occurrence, when you testified before Judge Samuels at the preliminary hearing?

A. Yes, of course.

Q. I will ask you if you gave this testimony before Judge Samuels.

Mr. Harris: Page, please?

Mr. O'Connor: Page 6, about line 17.

Mr. Harris: Very well.

Mr. O'Connor (reading): "Was there anything said about policemen in his speech?

A. That I am not certain of; I can't say as I remember it."

The Witness: Yes.

Q. You gave that testimony?

A. I did.

Q. What, since, has refreshed your recollection?

A. In regard to this testimony, you mean?

Q. Yes.

A. Nothing in particular, that I remember of.

Q. Then when you testified before Judge Samuels closer to the event about which you have testified this morning, did you not at that time remember that anything was said about police?

A. No, sir, I don't remember that I did.

Q. And so, therefore, you say now that they did say something about the police?

A. They did, yes, the police and the German military forces. I believe that is the reference you mean.

[fol. 156] Q. No, I am talking about the local police, the Fenton Thompsons, if you please.

A. You are referring to my testimony in connection with Max Bedacht's speech?

Q. Yes.

A. There was no reference to the local police in his speech, and I don't believe that I testified to that this morning.

Q. You did not?

A. No.

Q. I will be fair with you; you did not.

A. Yes.

Q. I will ask you when you testified before Judge Samuels if you testified at any place in the transcript that there were, or that there was any mention of police at any time that day?

Mr. Harris: Just a second, if the Court please. To which we object on the ground that it is irrelevant, incompetent and immaterial, and not a proper way to impeach the witness.

Mr. O'Connor: The objection is good. We will withdraw the question.

The Court: Very well; question withdrawn.

Mr. O'Connor:

Q. I am asking you—I am reading from page 6 of the transcript, line 12. You testified here this morning, as I understand you, Mr. Condon, that this man Bedacht—I think his name was?

A. Yes.

Q. "That the speech was largely a plea and he told about an interview he had had with a representative of the other half of this split Socialist Party while he was in Santa Cruz, who urged unity among the forces of revolution, and told how the forces of revolution had little difficulty in organizing in Germany until the military forces got after them?"

A. Yes.

Q. You testified that way before Judge Samuels, did you?

A. Yes.

Q. Now, this morning you changed that, the statement was this way: "Had little difficulty in organizing in Germany until the police force got after them."

A. Yes, I believe I did make that.

Q. You make no distinction, then, between a military force and a police force?

A. Well, not being familiar with the laws in Germany, I don't know; we might say the forces of—

Q. (Interrupting.) Mr. Condon, I am not asking your familiarity with laws in Germany or elsewhere. I am asking you just as to your recollection of your testimony. I will ask you if it is not the fact that when you first testified in this case you referred to the force as the military forces of Germany. That is true, is it not?

A. Yes.

Q. And this morning when you testified to this jury you changed that to the "police force"?

A. I did, yes.

Q. Now, Mr. Condon, will you kindly turn to this jury and tell them every single thing, every word or act of Miss Whitney that you observed that afternoon, or at any time?

A. That afternoon—that excludes the morning.

Q. That day, I should say.

A. Well—

Q. First, with your permission, let me withdraw that question for a moment—how did you come into the convention?

A. How did I gain permission to be there?

Q. Yes.

A. Why, I mentioned that I am acquainted with Mr. Snyder and Mr. Snyder was the only one that I knew that day, I believe. All the rest that I have mentioned I got acquainted with at that time. Mr. Snyder was there and I told him that I was up there from the

"Enquirer" and from the "United Press," the co-operative system, whereby the news service is represented, as well as the local paper, that I was to cover this convention.

Q. In other words, that you were there as a reporter?

A. Yes.

Q. You came and stated to Mr. Synder that you were a reporter representing the "Enquirer" and the "United Press"?

A. Yes.

Q. As such reporter, you desired admission to the meeting that you might report it for the news agency, and for your paper?

A. Yes.

Q. And with that understanding, and with that knowledge on the part of Mr. Snyder, you were admitted to that convention?

A. Yes.

Q. Now, there wasn't any outside guard or inner sentinel, or anything of that kind there?

A. No, I believe not.

Q. There was no secrecy about that meeting, as far as you could observe?

A. There seemed not to be, because, as I testified, I don't know whether that may have been omitted to-day, but at any rate, it was in Judge Samuels' court—there was no attempt to verify who was there after the report of the Credentials Committee was read; there [fol. 158] may have been others who did not belong there, besides myself.

Q. But the point I want to make to this jury, or rather, that I want you to make, was that it was an open convention as far as you knew. In other words, you did not have to put on any disguise, or pretend to be something that you were not, in order to gain admission?

A. No, sir, I did not.

Q. Now, will you turn to this jury and tell them everything that you heard Anita Whitney say and do in that convention?

A. Well, when the convention opened, the convention was called to order, and Miss Whitney, the first time I noticed her was when she was called upon for the report of the Credentials Committee, so she got up and gave and read it to the convention, and after that she took her seat near the center of the body, and that was the last I saw of her in the morning session, except that I noticed that she took her seat and that she did not go in or out during that morning session. Then in the afternoon session I did not notice her until after the Resolutions Committee was called upon, or when the order of business—the order—well, when the Resolutions Committee report came next on the order of business, the Resolutions Committee was still out, and somebody went out to see when they would be in, and at that time a person who I believe was Miss Whitney came to the door and said that they would be ready to report in about five minutes.

Q. Now, proceed.

A. From there?

Q. Yes.

A. Well, then this person——

Q. Up to this point, let me ask you, was there anything said or done by Miss Whitney which excited your especial interest as having been in violation of any law?

A. There was not, no, sir.

Q. No, proceed, please.

A. Of course, it is understood that since that report of the Credentials Committee is now in evidence—when with the reading of her report, of course, she read her own name; then in the afternoon when the Resolutions Committee came in, she came in with them, of course, and that was the last I saw of her. She took her seat in the convention.

Q. Did you hear Anita Whitney that afternoon make any speech? [fol 159] A. No, sir, I did not.

Q. Did not hear her say a single word other than that they would be ready to report in five minutes, after she had read the report of the Credentials Committee?

A. I did not, no, sir.

Q. And that is all that you can tell the jury as to the activities of Miss Whitney on that day?

A. That is.

Q. Yes.

A. Yes.

Q. Now, let me ask you this: You say that Fenton Thompson told you that he had framed the red flag, that one of his men had covered up the American flag with the red flag. Did he tell you his purpose in doing that?

A. He did not, no, sir. He did not tell me that he had framed it, either; he said it was one of his men that did that.

Q. You told us a little while ago that he said that he had done it by one of his men; that is a fact, isn't it?

A. He said that one of his men did it. He didn't say——

Q. No, no, no. I am calling your attention now, Mr. Condon, to your testimony here given but a few minutes ago, that Fenton Thompson said that he had done it by one of his men.

A. I would like to hear the testimony on that point. If I am not mistaken, I said——

Q. (Interrupting.) Will you read that, Mr. McSorley, on the first part of the cross examination?

(The Reporter reads back as follows: "All right, we will come to the draping of the American flag. Do you know a man by the name of Fenton Thompson?

A. I do, yes.

Q. Did Fenton Thompson ever tell you that a plant that he had at that meeting draped that flag?

A. He did, yes.

Q. He did?

A. Yes.

Q. In other words, then the red flag that you talked about this morning as having been thrown over the American flag was placed

there by a dupe that Fenton Thompson had in that convention, is that the fact?

A. That is what he told me.

Q. Yes; what else did Fenton Thompson tell you?

A. When?

Q. At any time—after that convention, or any other scheme, or trick, or dastardly outrage that he had perpetrated?
[fol. 160] A. He told me that he—that is, as far as I know of anything that he told me.

Q. Relate the whole conversation that you had with him about planting the American flag under the red tablecloth.

A. Well, this was two weeks following, I believe about two weeks following the incident, there was a vast roar in the paper, and we were discussing things, then he asked me if this American flag had been draped, some of the newspaper had said that it had and some said it had not, and I was the one who knew so he asked me if it had, and I said yes, it had with this banner, not a flag, that is, I would say a piece of cloth, in this case it happened to be red, you see, it was more or less of a tablecloth, I would say, and he says 'Do you want to know who did that', and I said 'Do you know?' and he said 'One of my men.'

Q. That was what Fenton Thompson said?

A. Yes.

Q. Where is Fenton Thompson?"

A. His men did it, not implying—or not implying that he had instructed his men to do it, I said.

Q. Well, the reporter has read the testimony, and you have heard that.

A. Yes.

Q. Well, you got the impression from Fenton Thompson that that was something that he had "put over," so to speak, didn't you?

A. I did not, no, sir. May I object to the question?

The Court: No, you can explain—go ahead.

Mr. O'Connor: Well, we don't want to embarrass the gentleman.

Q. I am just going to ask you this: You learned about that, you say, two weeks after it had happened?

A. About that, yes.

Q. Did you tell Judge Samuels about it when you testified before him?

A. I did not, no, sir.

Q. Why didn't you?

A. I was not asked.

Q. Oh, you were not asked?

A. No.

Q. And unless I happen to ask you now, you never would have told the jury that that was a frame-up, and you would have permitted this little woman, if need be, to go to the penitentiary with that in your mind?

A. I would, yes—no, I would not, no.

[fol. 161] Q. That is all.

A. Wait a minute—I would not have permitted it to go to the jury as I do not consider that that is an essential piece of evidence, myself, sending her to the penitentiary—that is not—the fact that the red flag was draped there by anybody doesn't indicate that she is guilty of criminal syndicalism any more than the mere fact that she stayed there after this flag was draped makes here no more guilty than it does me.

Q. You say that some of the newspapers said it was not draped, and others said it was?

A. Yes.

Q. You haven't any illusion about how the average man, and the average community, and the average juror, feel about the red flag, have you?

A. No, sir, I have not.

Q. You have no illusion about that?

A. Yes.

Q. And yet, having an illusion about that, you were quite willing to let these gentlemen and these ladies believe that the American flag at that meeting was obscured and covered up by the red flag, weren't you?

Mr. O'Connor: That is all.

Mr. Harris: If your Honor please, I ask the court to take at this time a five-minute recess.

The Court: Very well. Ladies and gentlemen of the jury, you will be now granted a five-minute recess. You are admonished at this time not to converse among yourselves, or with any other person, upon any subject connected with the trial of this case, or to form or express an opinion thereon until the case is finally submitted to you, and the officers may be sworn.

(Three officers sworn to care for the jury.)

After Recess

3 p. m.

The Court: Call the jury. (Jury called) People against Whitney. Will counsel stipulate that all the jurors are present?

Mr. Calkins: So stipulated for the People.

Mr. O'Connor: For the defendant.

Mr. Harris: Call Mr. Bedacht—Max Bedacht.

Mr. O'Connor: Before calling Mr. Bedacht, I would like to ask [fol. 162] Mr. Condon a question or two, please.

Ed CONDON recalled for further Cross Examination.

Mr. O'Connor:

Q. Reverting for just one question to the Fenton Thompson episode, Mr. Condon. As late as this morning Fenton Thompson told you that he had placed the red flag, or that one of his men had placed the red flag over the American flag, isn't that a fact?

A. He did, yes.

Q. This morning?

A. Yes.

Q. In this courthouse?

A. Yes, in this courthouse, yes.

Q. Now, this Loring Hall, that is a public hall in the City of Oakland, isn't it?

A. Well, in what way?

Q. Well, in other words, it is a hall?

A. It is leased by this Party, as I understand it.

Q. Well, it can be leased by any Party, can't it?

A. Yes.

Q. Now, these decorations that you speak of, these streamers of red, as you stated, that were there along the ceiling, will you describe them to the jury?

A. The streamers of red, yes.

Q. Yes.

A. Oh, crepe paper; streamers, you know, crepe paper cut about this wide, similar to the decorations you often see in butchershops, twisted spirally and running to the chandeliers.

Q. That is a decoration that has gone out of vogue, isn't it? We use to see it a great deal, but we don't see it so much any more.

A. I haven't seen it much.

Q. Since the price of paper went up?

A. No, sir.

Q. You don't want this jury to get the inference from anything that you have testified about Loring Hall that these streamers, or these decorations, were placed there by the Communist Labor Party?

A. I did not testify anything about that.

Q. No, no, I know what you testified to; but you don't want to give out that impression, do you?

A. I don't care about the impression, one way or the other.

Q. As a matter of fact, the decorations that you have described have been in that hall for some time, have they not?

A. Yes.

[fol. 163] Q. In other words, the hall was not freshly decorated when you were there?

A. That was the first time I had been to the hall.

Q. You may answer the question, were the decorations new decorations, or not, when you were there?

A. I could not say. They may have been there for a month, or they may have been there for six months, and they may have just been put up. It is hard to tell.

Q. And they might have been there for years, for all you know?

A. I could hardly say they had been there for years. The color was a little fresh and clear, but they were in a hall that was not used much, and I should say that they would last fresh and clean for six months.

Mr. O'Connor: That is all.

Mr. Calkins: That is all.

[fol. 164] JOHN C. TAYLOR, a witness called on behalf of the People, being first duly sworn, testified as follows:

Direct examination.

Mr. Harris:

Q. Your name is what, please?

A. J. C. Taylor.

Q. Where do you live, Mr. Taylor?

A. I live at 3255 Hopkins Street, Oakland.

Q. Where were you on the 9th day of November of last year?

A. I was at Loring Hall, Oakland, most of the time.

Q. And what time did you arrive there?

A. I would imagine about ten o'clock; I don't remember exactly.

Q. And remained how long?

A. About ten o'clock at night, I think it was, or eleven.

Q. Until then?

A. Yes.

Q. You know Miss Whitney, do you?

A. Yes, I do.

Q. Did you see her there on that occasion?

A. I did.

Q. At what time, please?

A. I believe she was there during most of the day and the evening.

Q. What was going on at Loring Hall, what meeting was being held?

A. We had a convention of the Communist Labor Party, a state convention.

Q. A State convention of the Communist Labor Party?

A. Yes.

Q. At that convention, the members consisted of what—or of whom, please?

A. It consisted of delegates to it of all the locals that had joined the Communist Labor Party.

Q. I don't mean their names at all, but representing what cities, please, if you know, Mr. Taylor?

A. Santa Cruz, San Jose, San Francisco, Oakland, Fresno, Lodi—I think that was all that were represented.

Q. And approximately how many delegates were there, Mr. Taylor?

A. I should imagine 75, perhaps 80; maybe more.

Q. And who were you representing, if anybody?

A. Well, I had been State secretary of the Socialist Party for a year and a half, and in that capacity I was continuing over as temporary secretary of the Communist Labor Party.

Q. Then you were the temporary secretary at this meeting?

A. Yes.

Q. And do you know what branch of the Socialist Party Miss Whitney represented, if any?

Mr. O'Connor: Now, just a minute, Mr. Taylor. We object to that as calling for the conclusion of the witness.

Mr. Harris. The question was if he knew.

Mr. O'Connor: Well, that is his conclusion, if he knew which branch.

The Court: He is asked for his knowledge. If he cannot answer upon his knowledge, he then would be answering the question. Go ahead; go ahead.

A. A member of Local Oakland.

Mr. Harris:

Q. A member of what?

A. Local Oakland.

Q. How many other members of Local Oakland were there, if you please?

A. I believe there were 16 delegates represented.

Q. Pardon me?

A. Sixteen, I believe, were present.

Mr. Pemberton: We move to strike out the answer as not responsive to the question—but we would like to have the question answered, to satisfy our curiosity.

The Court: Well, then, have the question read, and see if it is not responsive.

(The Reporter reads the question.)

(Discussion.)

Mr. Harris: That is quite true. I withdraw the question. I did not mean to say how many delegates from Local Oakland were there not other members, as Mr. Pemberton has called my attention to.

Juror McClymonds: Your Honor, I would like to know what Local Oakland means.

The Witness: Of what?

Juror McClymonds: Local Oakland.

A. It is just Local Oakland.

Mr. Harris: What you mean is the Socialist Party of Oakland, that does not mean east of the Lake. Is that what you mean?

[fol. 166] A. No, this is the downtown local, that is, its headquarters were downtown; but the members joined from anywhere in this city or from any part of the State.

Mr. Harris:

Q. Local Oakland—of what party is that the name?

A. Local Oakland, yes.

Q. I mean, you mean Local Oakland of the Socialist Party?

A. It was never known as Local Oakland of the Socialist Party; it was just Local Oakland.

Mr. O'Connor: As I understand it, that was the term, merely.

A. A term, yes.

Mr. Pemberton: It was a part of the Socialist organization?

A. It was.

Mr. Harris:

Q. As I understand it, you stated that you were the Secretary of this State Convention of the Communist Labor Party of America?

A. California.

Q. I will show you these minutes of the State convention and ask you to look them over, please. Are those the minutes of the meeting taken by you on November 9th of last year?

A. They seem to be.

Q. I wish you would look them over carefully and decide whether or not they are.

A. Those are the ones I wrote up.

Mr. Harris: If your Honor please, at this time, I ask that these minutes be introduced in evidence, taking the appropriate number as an exhibit.

Mr. O'Connor: Same objection, if your Honor please.

The Court: It may be overruled, and let the document be marked—well, I will leave it for the Clerk to mark. It may be admitted next in order.

Mr. O'Connor: Very well, your Honor, next in order.

The Court: It may be admitted in evidence and take the next number.

Mr. Harris: "Minutes of the State Convention of the Communist Labor Party of America at Loring Hall, Sunday, November 9, 1919.

The convention called to order by acting State Secretary-Treasurer John C. Taylor at 10:30 a. m. Call for nominations for temporary chairman, Comrade Tobey nominated.

"Motion that nominations be closed. Carried. Comrade Tobey seated.

"Nominations for temporary secretary called for. Comrade Taylor nominated. Motion that nomination be closed. Carried.

"Comrade Taylor declared seated. (Comrade Tobey fails to make his speech.)

"Call for nominations for Credentials Committee. Those nominated were Bauer, Friend, Whitney, Wilson and Ragsdale. Motion that those nominated be declared elected. Carries.

"Chairman declares a recess in order to give Credentials Committee an opportunity to examine credentials.

"On re-convening, report of Credentials Committee recommending the seating of all the delegates was received and recorded.

"Motion that the temporary officers be made permanent. Carried.

"Hearty singing by all was next indulged in.

"Election of Committees was the next order of business.

"Those nominated and elected to the Committee on Constitution and By-laws were Dolsen, Milder, Tobey, Bickel and Coleman.

"Those nominated and elected to Committee on Resolutions were Griest, Bauer, Alverson, Whitney, Eichhorn and Wendrich.

"Those nominated and elected to the Committee on Press and Propaganda were Warwick, Sessions, Reed, Bickel and Snyder.

"Comrade Max Bedacht was then called upon for a report of his work with the National office. He took the floor and told of the efforts being made to bring about unity between the Communist Party and the Communist Labor Party. He told us that the greater factor for unity would be the building up of our own party strong and upon a revolutionary basis, and stated that the policeman's clubs and machine guns would accomplish the rest.

"Motion that we adjourn to meet again at 2 p. m. and take up the report of the Committee on Constitution. Carried.

"Convention called to order at 2:30 p. m. by Chairman Tobey, who announced that the Committee on Constitution was not ready to report.

[fol. 168] "Motion that we hear the report on Press and Propaganda. Carried. Chairman Snyder read the report favoring: A monthly bulletin to be printed in 'The World'; the World to be made the official organ of the Communist Labor Party of California; that we get behind the efforts being made to establish a daily paper; that we agitate for the O. B. U. and for shop steward Committees, a uniform literature department, and a publishing house for the Coast, and for a State lyceum bureau in connection with the National.

"Motion that report be adopted as read. Amendment—That all reports be read through before any of them are acted upon. Carried.

"Motion that we elect a committee to help in the arrangements being made for the organization of a daily labor paper. Carried. Those elected were Snyder, Scarcereaux, Smith, Sessions, Ragsdale, Reed and Dolsen.

"Committee on Ways and Means was next called upon. Their chairman Smith reported in favor of a permanent organizer for San Francisco and one for Oakland, and a general state organizer; and that the Party arrange with Comrade Whitaker to take over the properties sold to him by the State Executive Committee of the Socialist Party.

"Chairman of the Committee on Resolutions Bauer was next called upon for a report. He read six resolutions on the following subjects: Unity of Communist Parties and class war prisoners; Greater Political Action; Workers Control; Foreign Relations; Education; Industrial Unionism.

"Comrade Dolsen of the Committee on Constitution read a draft of the Constitution which their committee has prepared. Motion That the draft be taken up seriatim. Carried. (The draft as amended is included in this report.) Motion That Committee reconsider parts. Carried.

"Motion That we take up the report upon Press and Propaganda. Carried.

"Motion That four members of the S. E. C. be members of the World Committee. Lost.

"Motion That the report be adopted. Carried.

"Motion That we elect the officials as provided for in the new Constitution, a State Secretary-Treasurer and five members to the State Executive Committee. Carried.

"Nominations for state Secretary-Treasurer were asked for. Those nominated were Comrades Dolsen and Taylor. The vote resulted in 11 for Taylor and 20 for Dolsen. Comrade Dolsen was declared elected.

"Nominations were called for on the state executive committee. Those nominated were Bauer, Ragsdale, Taylor, Whitaker, Coleman, Smith, Milder, Whitney and Tobey. Those elected were Bauer, Ragsdale, Taylor, Whitaker and Tobey. Motion That these comrades are declared elected. Carried.

"Nominations for alternates were next called for. Those elected were Milder and Whitney.

"Motion That the constitution as finally read be adopted. Carried. Motion That the report of Committee on ways and means be taken up. Carried. The report was re-read and excepting that the word 'Field Secretary' was placed instead of 'Field Organizer' the report was adopted as a whole.

"Motion That we take up the resolutions. Carried. Resolution on Unity accepted; resolution on Workers control adopted; resolution on Unity adopted; Industrial unionism adopted; Class war prisoners resolution adopted; resolution on political action caused a lengthy debate which resulted in accepting the National Report on program in its place. Motion That the paid officials of the Party may not be members of the State Executive Committee. Carried. Motion That the minutes of this convention be published in the World. Carried.

"Motion That we adjourn. Carried. Signed John C. Taylor, Secretary."

Q. Throughout or in this report in the places in which it mentions the people's names as having been appointed to committees, and so forth, when the name of Whitney is on your minutes, to whom do you refer, or of whom do you refer?

A. The defendant, Miss Whitney.

Q. Miss Anita Whitney? A. Yes.

Q. Do you know whether or not your State platform and program was printed in any newspaper?

A. It was printed in "The World."

[fol. 170] Q. I will show you this copy of "The World," dated November 21st, which is "People's Exhibit No. 7 for identification," and ask you to look over it and tell me whether that is a copy of the platform to which you refer as having been adopted by the Communist Labor Party of California, at Loring Hall, on Sunday, November 9th of last year?

A. I believe that is, unless there is some little typographical error, that is it as printed.

Q. You said something about "with the exception of" what?

A. I say, unless there is some slight error, it is as we accepted it.

Q. To the best of your knowledge and belief, it is the platform, then, is it?

A. Yes.

Q. That is the platform, is it not?

A. Yes.

Mr. Harris: If the Court please, I at this time ask that this be introduced in evidence, taking the number of "7," by which it was introduced.

Mr. O'Connor: Same objection.

The Court: It may be overruled.

Mr. Harris: It is my desire to be absolutely fair, so, while I am not certain, it is evidently shown that by the reports of the committees that Miss Whitney, as one of the members of the committee, the committee having rendered its report indicates that she was for the change rather than industrial action of the masses.

Mr. O'Connor: I would say, in response to that, that the resolutions will speak for themselves, Mr. Harris.

Mr. Harris: No question about that, but I am asking you—they have already been identified, but inasmuch as Mr. Taylor was the secretary, we may pass it with the stipulation that these were the resolutions passed by them.

Mr. O'Connor: No question about that.

Mr. Harris: No question about that whatsoever.

Mr. O'Connor: None at all.

Mr. Pemberton: Could I have that statement of Mr. Harris read, Mr. Reporter? I did not get it, and I don't know whether the Reporter got it, or not?

(Statement partially read.)

[fol. 171] Mr. Pemberton: As I understand it, you are right in saying that they showed that Miss Whitney once was in favor of a change by political methods.

Mr. Harris: I said that if I did not know that—I said that evidently—what I meant to say, that the majority of the committee, which was the prevailing end of it, was for the suggested changes by political methods. I did say that, Mr. Pemberton.

Mr. O'Connor: Mr. Harris stated, in a spirit of absolute fairness to Miss Whitney.

Mr. Harris: I hope you did not grasp any other meaning to it.

Mr. Pemberton: No, I did not. That is fair, that is correct. I wanted to be sure that I got you right.

Mr. Harris:

Q. Mr. Taylor, all of the reports of the committees were adopted by the delegates at this meeting, were they?

A. I believe there was one exception.

Q. That one exception was which one, please?

A. I could not say—that is, in number or numerical number?

Q. I mean in substance.

A. There was one referring to political action.

Q. One referring to political action. Miss Whitney was on that committee, was she not?

A. She was upon the Resolutions Committee, yes.

Q. And the report that was rendered by that committee, of which she was a member, was not adopted by the delegates, is that correct?

A. Yes.

Q. In lieu of it and in its place and stead, what was adopted?

A. We adopted the report of the National Committee's report upon the program and labor.

Q. Can you in this paper point out the report of the National Committee on that point, please? (Showing.)

A. Well, the whole thing, I believe, is adopted in its place; there is no particular part that I can pick out that expresses it, the whole thing was adopted.

Q. Then, so I may understand it thoroughly, do I understand that the resolution then was to adopt the whole platform, and not any [fol. 172] thing in particular, about this one measure upon which the committee had been appointed?

A. I don't just remember the resolution. If you read it through then I will criticise and state what were, and what we objected to.

Q. I will hand you these resolutions and let you pick out for yourself, Mr. Taylor, the resolutions which you are referring to.

A. By the resolution selected here.

Q. This is the resolution, I offered this and the Court admitted it, but it would be more clear to the jury if I might read it again. (Reading:) "The C. L. P. of California fully recognizes the value of political action as a means of spreading Communist propaganda; it insists that in proportion to the development of the economic strength of the working class, it, the working class, must also develop political power. The C. L. P. of California proclaims and insists that the capture of political power, locally or nationally, by the revolutionary working class can be of tremendous assistance to the workers in their struggle of emancipation, therefore we again urge the workers who are possessed of the right of franchise to cast their vote for the party which represents their immediate and final interest, the C. L. P., at all elections; being fully convinced of the utter futility of obtaining any real measure of justice or freedom under officials elected by parties owned and controlled by the capitalist class." By the committee, the whole committee, I think.

Mr. O'Connor: Yes, by the whole committee.

Mr. Harris: Miss Whitney's name appears with a number of others. Now, then, in lieu and in place of that, I understand you to say that this convention of the delegates did not accept this resolution, but accepted another one, is that correct?

A. That is correct.

Q. Will you now tell us what one they accepted?

A. They accepted the National report upon program and labor, which you will find in this paper.

Mr. O'Connor: That is in that box there.

A. Yes, Platform and Program of the Communist Labor Party.

Mr. Harris:

Q. Do I understand it is a page or a part of a page?

A. No, we adopted the whole. The Matter in that resolution deals [fol. 173] with the political end only, and we made it very clear in our platform program all the way through that we wanted to add to that "industrial organization" also. Now, the political phase of that is all right, but it did not include "industrial organization."

Q. What I want to get at is that this whole matter, this whole platform and program, includes what?

A. Includes an explanation of the whole industrial organization which we wish to embody as a part of our tactics.

Q. What I want to get at first is this: There is no one paragraph for it is not in concise form; it is interwoven throughout the entire platform, and you could not pick out any two paragraphs or any one paragraph, and read what you are trying to explain to us now. Is that what I understand?

A. That is the situation.

Q. In other words, you adopt that platform in toto as regards changes by political organization as well as industrial organization?

A. That is correct.

Q. Now, then, that is the platform that is contained on pages 2, 3 and 6 of the paper entitled "The World," is it, dated Friday, November 21, 1919 and in evidence as "People's Exhibit No. 7" is that correct?

A. Yes.

Q. Since this meeting of November 9th, to which you have referred and prior to the date of the filing of this Information, which I believe was December 30, 1919, were you present at any meeting of the Communist Labor Party, or any committee meetings?

A. I was.

Q. When?

A. I cannot give the exact date; I attended two or three meetings, two or three executive Committee meetings.

Q. Where were they held?

A. I believe the first one was held in my office, in Room 211 Bacon Building.

Q. What?

A. I think the first one was held in 211 Bacon Building.

Q. That is the headquarters of the Communist Labor Party?

A. That is the office of the State Secretary.

Q. Can you give us an idea of when the meeting was held at your office?

A. I cannot.

Q. Approximately?

A. Probably shortly after that convention.
[fol. 174] Q. Approximately when?

A. Possibly a week.

Q. A week?

A. I am not sure that we held a meeting there. Some of us met,

and I don't know whether we held a meeting there or whether we did not. The second meeting we held, anyway, later on.

Q. What?

A. The second meeting was held in San Jose, and I think that was the organization meeting.

Q. The second one was held in San Jose?

A. Yes.

Q. And the third one?

A. The third one was in San Francisco.

Q. And the fourth one?

A. The fourth one was in San Francisco.

Q. I thought you said there were a couple. Was your office at 211 Bacon Building?

A. Yes.

Q. That is your office?

A. Yes, it was.

Q. Was Miss Whitney present at the one held in your office on or about November 18th?

A. I believe not.

Q. What?

A. I believe not; being an alternate, she would not necessarily be present, anyway.

Q. Was Miss Whitney present at the one in San Jose?

Mr. Pemberton: I object to that, if the Court please; that is out of the jurisdiction of this Court, and of this District Attorney, if it was.

The Court: It may be overruled.

A. It was.

Mr. Harris:

Q. When I say "San Jose," I mean San Jose, Santa Clara County, State of California.

A. Yes.

Q. When do you fix that as being, please, Mr. Taylor?

A. I can't remember the date.

Q. Approximately, as one to the first time, for instance, we will say.

A. December 9th, I should imagine, somewhere in there; the early part of December.

Q. And what was that meeting?

Mr. O'Connor: Let me call the District Attorney's attention to the fact that that is long after the time referred to in the indictment, your Honor.

Mr. Harris: I appreciate that, but the question is a matter of law. We contend that we can show her acts up to and including the date of the filing of the Information.

[fol. 175] Mr. Pemberton: I do not understand how in the world you ever got that information or notion. The court seemed to have that notion——

The Court: I can't hear what you gentlemen are saying among yourselves there. I would just as soon hear it, too.

Mr. Harris: I say it is our contention, if your Honor please, that we can show the acts of Miss Whitney up to the time of the filing of this information.

Mr. Pemberton: If the Court please, if it relates to the time of the occurrence, and throws any light on it, they can go into any of her actions at any time, even today, in the nature of admissions after the filing of the information, but there is a general rule that they are within right down to the exact date of the information. But when they have once selected an incident, they must stick to that incident, or something that will throw light on that incident. We don't seem to understand each other at all.

Mr. Harris: Our contention being, if the Court please, that this is also an organization of the Communist Party, and it is another step towards an organization in San Jose, and this count alleges that she organized, and assisted in organizing, and become a party in advocating, and so forth.

The Court: You may proceed. Let the witness answer the question. Overruled.

A. I can't remember the question now.

The Court: Whenever you don't remember a question, call upon the reporter to read it.

Mr. Harris: I might ask you again—withdraw the question. What was done at San Jose—I believe that was the substance of the question, was it not?

Mr. Pemberton: That is sufficient—of course, our objection was made.

A. There was a committee.

The Court: Overruled.

A. There was a committee meeting of the State Executive Committee, and the ordinary business was gone over. I don't just know what particulars we had before us.

[fol. 176] Mr. Harris:

Q. Were there any delegates from San Jose there?

A. Casper Bauer was present.

Q. Was there at that time a Communist Party, Labor Party, formed in San Jose, or a local of it?

A. Yes.

Q. Did you at that time meet with the delegates of that party?

A. I would not speak of them as delegates. I remember our meeting there was the meeting of the Executive Committee of the Communist Labor Party.

Q. Some of the members of the Executive Committee were members of the Executive Committee appointed by the local of the Communist Labor Party at San Jose. Is that correct?

A. No, sir.

Q. Did I so understand you?

A. No, sir.

Q. Were there no San Jose representatives there from San Jose?

A. Casper Bauer, I say, he was a resident of San Jose. San Jose happens to be the home of Local San Jose of the Communist Labor Party but he was not there as a representative of that organization, he was there as an elected committeeman to the State Executive Committee.

Q. Were there any San Jose members of the Local Communist Party in San Jose there?

A. There may have been one or two. I think the janitor of the hall, and perhaps one or two others, were present, but it was not an open meeting.

Q. What?

A. It was not an open meeting.

Q. It was not an open meeting?

A. No, sir.

Q. Mr. Taylor, when do you fix the meeting in San Francisco to which you are referring? The first meeting in San Francisco, which was the third meeting after your meeting of November 9th?

A. The meetings were never appointed for specific dates. It was left to the State Secretary to call the meetings of the State Executive Committee.

Q. You surely must have misunderstood me. I may have elaborated too fully and involved the question. I asked you when that meeting in San Francisco was, which was the third meeting from that of November 9th. You have described that you had a meeting in your office, which I suggested was about the 18th of November. Then you said you had one in San Jose, which was about December [fol. 177] 9th, and you said you had two in San Francisco, did you not? Now, then, when do you fix the first one of the two in San Francisco?

A. Probably the early part of January.

Q. Of this year?

A. Yes.

Q. Was Miss Whitney at that meeting?

A. She was not.

Q. When do you fix your second one?

A. About a week ago.

Q. Was Miss Whitney at that one?

A. She was present.

Q. You fix that about a week ago?

A. Yes.

Q. Where was that held, please?

A. That was held in San Francisco.

Q. I heard you the first time. I said whereabouts in San Francisco?

A. On Golden Gate Avenue. I don't remember the address. I think somewhere near Gough Street.

Q. What was the object of that meeting, please?

A. The usual routine of business to take up.

Q. Were you secretary of that meeting?

A. No, sir.

Q. Who was?

A. Mr. Dolsen.

Q. Who?

A. Mr. Dolsen.

Q. Was this meeting in San Francisco held at a private residence?

A. No, sir, it was not.

Q. It was not?

A. No, sir.

Q. It was a Communist Labor Party meeting, a meeting of the Communist Labor Party; that is correct, is it not?

A. Yes.

Mr. Harris: That is all.

Cross-examination.

Mr. O'Connor:

Q. Mr. Taylor, you are here, I take it, under subpoena?

A. I am.

Q. By the prosecution?

A. Yes.

Q. When you were called upon to exhibit yourself to the jury right after 2 o'clock this afternoon, you were here in this courtroom under the direction of the authorities?

A. I was.

Q. By subpoena?

A. Yes.

Q. Now, Mr. Taylor, you are under indictment, are you not?

A. I am.

Q. And you are testifying here under no understanding with the [fol. 178] District Attorney's office, are you?

A. None at all.

Q. You realize, of course, that where the District Attorney puts you on the stand, that you voluntarily testify, and in most cases it obviates the necessity of any further prosecution of the case?

Mr. Harris: Just a minute—let me hear that question.

Mr. O'Connor: I will withdraw that, Mr. Harris.

Q. Have you, before coming on the stand, Mr. Taylor, conferred with the District Attorney's office?

A. He called me into his office Friday afternoon last, and we talked for two hours, I think, about.

Q. By saying "he," who do you mean?

A. Fenton Thompson asked me to come down here to see him; that they wished to interview me.

Q. And they interviewed you concerning the case of Miss Whitney?

A. Not putting it in that way, but that is what it was.

Q. That is what it turned out to be, wasn't it?

A. Yes.

Q. Did you talk with these gentlemen?

A. I did.

Q. For how long did you talk with them?

A. I think about from 4 o'clock to 5 or half past 5.

Q. About the case of Miss Whitney?

A. There were a great many questions asked regarding, or about Miss Whitney, involving her.

Q. Now, that Loring Hall—you heard the testimony of Mr. Condon this morning?

A. I did.

Q. You heard the testimony about those streamers in the hall?

A. Yes.

Q. Were those erected, or placed there by the Communist Labor Party?

A. I don't know. We had just taken the hall over. We had bought out the hall some months previous, perhaps two weeks, and I don't know that we even owned it then, but we took over everything as it was, and I don't know whether they were put there by us or whether they were put there before I came.

Q. You know nothing about that?

A. I do not.

Q. Now, I will ask you, Mr. Taylor—by the way, Mr. Taylor, you will pardon this question: You are a college graduate, I understand? [fol. 179] A. Well I suppose so.

Q. Well, that is a fact, isn't it?

A. I went to Stanford for three years and a half.

Q. At all events, you were there for three years and a half?

A. I did not graduate.

Q. And you are ordinarily acquainted with the meanings of English words?

A. I am.

Q. And you do not ordinarily, I take it, Mr. Taylor, employ words, the meaning of which you do not understand?

A. No, sir.

Q. You have read the platform of the so-called Communist Labor Party?

A. I have.

Q. I will ask you if you know—not your conclusion, but if you know, following your Honor's ruling, if you know whether or not, again following your Honor's ruling——

The Court: Just go ahead.

Mr. O'Connor:

Q. (Continuing:) If you know whether or not the Communist Labor Party is an organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism.

Mr. Harris: Just a second—to which we object upon the ground, if the Court please, that it calls for the conclusion of the witness.

Mr. O'Connor: When you were talking, when your Honor suggested, do you know it was about a fact, it was not a question of interpretation of something then. Your Honor, we are asking for the fact here.

Mr. Harris: Objected to as calling for the conclusion of the witness.

The Court: It is a conclusion, that your question must bring forth.

Mr. Pemberton: It was not when the other side asked it, your Honor.

The Court: I do not stand for any such insinuation as that, I will have you understand, sir. What do you mean? I would like to know by that remark, what do you mean to say?

Mr. Pemberton: Mr. O'Connor was following the example set by the District Attorney.

[fol. 180] The Court: Never mind, but there was a remark that was made after that.

Mr. O'Connor: If your Honor cannot point out to me the distinction—

The Court: Never mind about the distinction; just stop talking. I would like to know what the insinuation was meant for just now before we proceed another moment in this trial.

Mr. Pemberton: I did not insinuate, your Honor. If I have anything to say, I say it direct.

The Court: What did you mean sir?

Mr. Pemberton: I meant what I said.

The Court: You then stand in contempt of this court, sir.

Mr. Pemberton: If the Court please, I was merely calling your Honor's attention to the fact that Mr. O'Connor, my associate, was following the exact form of the questions that were asked by the District Attorney. There is nothing contemptuous in my remark.

The Court: I think it is. Let us have the record; let us have the record on this—just a minute, now.

Mr. Harris: In fairness to Miss Whitney, your Honor, I would suggest that the jury be excused, if we are going over a matter of this kind.

Mr. O'Connor: Mr. Harris, you have been very fair, but I would like the jury to hear this. It is a matter of no little importance here.

The Court: It is just a matter concerning the Court, and not the Jury. The jury may be excused.

Mr. O'Connor: What objection can there be to the jury hearing it, your Honor?

The Court: I have in mind the objection all right. Ladies and gentlemen of the jury, you may now be given a ten minute recess. Let me suggest that you are admonished at this time not to converse among yourselves or with any other person upon any subject connected with the trial of the case, or to form or express an opinion

thereon until the case is finally submitted to you. Let the officers be sworn.

(Officers sworn. Jury excused.)

[fol. 181] Mr. O'Connor: Your Honor will remember that the question, if my memory serves me, that Mr. Harris, with a certain witness, I believe this witness upon the stand, or either—no, it was when Bedacht was on the stand, with regard to the Chicago convention, and whether it split into two parties, and what two parties it split into, and we objected to that upon the ground that it was calling for a conclusion of the witness, and you stated no, that that was not calling for a conclusion of the witness, and he asked for the fact, he asked whether or no it did, and that is why, in asking this question, I used the precise language used by the District Attorney, but not with the precise ruling—

The Court: We will get away from that and get down to the remark that was made here—that is what I am concerned with right now. Never mind, now.

Mr. O'Connor: Let me ask your Honor: Upon the argument of the question, you can probably remember, your Honor—

The Court (interrupting): But I am concerned with this one remark here—not the objection now.

Mr. O'Connor: I just want to say to your Honor, with entire politeness and with all due regard, that we must not, as counselors at this bar, be cowards; that when the rulings of the Court are such that they legitimately call for criticism, we must, in a proper and respectful manner, make our protest against it. Now, I don't believe that Judge Pemberton meant that at all, your Honor—just a minute—if Judge Pemberton is to be charged with contempt of court for that, I ask to join him in your Honor's castigation.

The Court: We will wait until that occasion arises, Mr. O'Connor. Just a minute, now,—just read that last remark, Mr. Reporter.

(The reporter reads back record.)

Mr. Pemberton: Now, if your Honor please, if I have insulted the Court, or hurt the feelings of the Judge of this Court, I beg to apologize. I thought I was only reminding the Court of a fact, and I thought I was doing it in a respectful manner, and I beg the Court's pardon.

[fol. 182] The Court: I will say to you Mr. Pemberton, that I do not desire in any way to punish you, or to feel for one moment that you meant that remark. If you did not intend to insult this Court or if you did not intend to be contemptuous to this Court, it is not my desire to punish you, as I say, nor is it my disposition to impose any sort of a fine upon you, and with the apology that has been made, the Court is willing to accept that. I have known you for some years, and I am quite willing to accept the apology that has been made; and if it was said in the sense that you said it was, and with the only intention that you said it was, I take your word for it that it was and I will accept the apology and let the matter be closed.

(Jury recalled.)

The Court: Will counsel now stipulate that all the jurors are present?

Mr. Calkins: The People will so stipulate.

Mr. O'Connor: The defense will so stipulate.

The Court: The ruling of the Court is that the objection is sustained.

Mr. O'Connor:

Q. I will ask you, Mr. Taylor, if you ever at any time or under any circumstances heard Miss Whitney say anything which could even be construed as advocating, teaching, aiding or abetting criminal syndicalism?

Mr. Harris: Just a moment. To which we object, if the Court please, as also calling for the conclusion of the witness.

The Court: As to criminal syndicalism, yes. It may be sustained.

Mr. O'Connor:

Q. What is truth, your Honor? How can that be a conclusion? I am asking this man just as you have stated.

The Court: He could conclude and make up his mind whether or not he has ever heard her say anything, if she did make it.

Mr. O'Connor: No, no. Did you ever hear?

The Court: If you did not intend that element, reframe your question.

Mr. O'Connor: It is exactly what I did intend, your Honor.

The Court: Sustained, then.

[fol. 183] Mr. O'Connor:

Q. Did you ever hear Anita Whitney at any time or under any circumstances, advocate, teach, aid, and abet criminal syndicalism?

Mr. Harris: Just a second. To which we object, if the Court please, upon the ground that it calls for the conclusion of the witness.

The Court: On the same grounds, sustained.

Mr. O'Connor: If your Honor please, you have already ruled that the indictment informed Miss Whitney that she was informed of what she is charged with. Now, permit me respectfully to call the Court's attention that you are now ruling that she is charged with a conclusion of law, because I am reading from the indictment—

The Court: You understand, as well as the Court does, that proof is one thing and pleading is another. I take it.

Mr. O'Connor: I don't take it; I don't take it.

The Court: Then it is not necessary for the Court to go any further. Let the objection be sustained.

Mr. O'Connor: All right.

Q. Did you ever, Mr. Taylor, know of Anita Whitney, by spoken or written words, to justify or attempt to justify crime?

Mr. Harris: Just a second. To which we object, if the Court please, upon the ground that it calls for the conclusion of the witness.

The Court: It may be sustained.

Mr. O'Connor: But, if your Honor please——

The Court: The ruling has been made.

Mr. O'Connor: We are entitled to some assistance to get at the Court's mind.

The Court: I am not going to say any more now.

Mr. O'Connor: We are entitled to some assistance to get at the decide this case, we want to show to this jury, that never in her life did Anita Whitney ever say or do a single thing, and we throw down the bars to the gentleman on that, which can even by the wildest flight of the imagination be construed into an act of violence or a [fol. 184] suggestion of violence. Now, how are we to prove it, your Honor, unless we take their own witness, the man they put upon the stand and the man who is associated, they have shown, with Anita Whitney in this deal, part of which they complain about and say to him, "What did Miss Whitney do?" And the jury are entitled to know it, your Honor.

The Court: That is not the question at all.

Mr. Harris: Why don't he ask that question? What did she say?

The Court: You did not ask that question, what did she do?

Mr. O'Connor: All right. At the expense of being a long while here—what did Anita Whitney do towards teaching or aiding or abetting or speaking or writing of crime and violence?

Mr. Harris: Just a second. To which we object, upon the ground that it calls for the conclusion of the witness and no time or place has been fixed. I am objecting particularly that it calls for the conclusion of the witness.

Mr. O'Connor: We will fix the time and place as being in the State of California, and we will place the time as during the entire period that you have known or known of Anita Whitney.

Mr. Harris: We object to it.

Mr. O'Connor:

Q. (Continuing:) Did you, during all of that time, or at any time, hear Anita Whitney advocate violence?

Mr. Harris: To which we object upon the ground that it calls for the conclusion of the witness.

Mr. O'Connor: May I ask this question, Mr. Harris: Do you gentlemen contend that Anita Whitney ever did in her life advocate violence?

Mr. Harris: Mr. Calkins agreed that it is a matter for the jury to pass upon.

Mr. Pemberton: Not under the evidence.

Mr. O'Connor: There we are, your Honor, I say to these gentlemen, do they contend the woman is on trial—she is entitled to some rights, you know. This is not a legal lynching. She is entitled to some rights, I say to them. Do they contend—and we can shorten the trial materially—do they contend that at any time under any

[fol. 185] circumstances did Anita Whitney ever say or do a thing which might be construed as implying that she was in favor of a government change by violence; you asked the question of the witnesses and they have answered that. Now, we better turn to the examination of the witnesses.

The Court: They have given whatever answer they are going to give, I take it. I take it they have given whatever answer they are going to make.

Mr. Harris: We have stated that that is a matter for the jury to pass on, that is evidence and is not for us to pass upon.

Mr. O'Connor: For the purpose of the record, your Honor, I will ask the following questions:

Q. I will ask you, Mr. Taylor, if in the State of California and during the period of your association with Anita Whitney, and during the time mentioned by you here upon the stand, did you ever know Anita Whitney to wilfully, wrongfully, deliberately and feloniously organize and assist in organizing and was and is and knowingly became a member of an organization, society, group and assemblage of persons, organized and assembled to advocate, teach, aid, and abet criminal syndicalism?

Mr. Harris: We object to that, if the Court please, as calling for the conclusion of the witness.

The Court: Sustained.

Mr. O'Connor: Then let us concede that I have read the charging part, I am rather hoarse today—the charging part of the indictment in all five counts, and that the same objection has been made, and with the same unanimity they have been sustained.

The Court: We had better have them read, nevertheless, so we will know what is being objected to, and what objections are being sustained.

Mr. O'Connor: Very well, then.

Q. I will ask you if, in the State of California, and during the period of your acquaintance and association with Anita Whitney, did you ever know her to then and there unlawfully and wilfully, wrongfully, deliberately and feloniously print, publish, edit, circulate and publicly display books, papers, pamphlets, documents, [fol. 186] posters and written and printed matter containing and carrying written and printed advocacy of criminal syndicalism?

Mr. Harris: To which we object, if the Court please, on the ground that it calls for the conclusion of the witness.

The Court: It may be sustained.

Mr. O'Connor:

Q. Mr. Taylor, during the period mentioned and in the State of California during the time of your association with and acquaintance with Anita Whitney, did you ever know of Anita Whitney to unlawfully, wilfully and deliberately and feloniously, by spoken and written words and by personal conduct, advocate, teach, aid and abet criminal syndicalism, and the duty, necessity and propriety of com-

mitting crime, sabotage, violence and unlawful methods of terrorism, as a means of accomplishing a change in industrial ownership and control, and as a means of effecting a political change?

Mr. Harris: To which we object, if the Court please, on the ground it calls for the conclusion of the witness.

The Court: It may be sustained.

Mr. O'Connor:

Q. I will ask you, Mr. Taylor, if in the State of California and at the period that I have spoken of during the time that you have been acquainted with Anita Whitney and associated with her, did you ever know Anita Whitney to unlawfully, wilfully, deliberately and feloniously by spoken and written words justify and attempt to justify criminal syndicalism and the commission and attempt to commit crime, sabotage, violence and unlawful methods of terrorism in an attempt then and there to approve, advocate and further the doctrine of criminal syndicalism?

Mr. Harris: To which we object, if the Court please, upon the ground that it calls for the conclusion of the witness and is not proper cross-examination.

The Court: Sustained.

Mr. O'Connor:

Q. I will ask you, Mr. Taylor, if, during the period of your association and acquaintance with Miss Anita Whitney in the State of California, you ever heard Anita Whitney, or ever saw Anita Whitney, or ever knew of Anita Whitney unlawfully, wrongfully, [fol. 187] deliberately, wilfully and feloniously by personal acts and conduct, practice and commit acts advising, advocating, aiding and abetting the doctrine or precept of criminal syndicalism with intent to accomplish a change in industrial ownership and control, or to effect a political change?

Mr. Harris: To which we object as calling for the conclusion of the witness, the same ground as the previous question, your Honor.

The Court: Let the objection be sustained.

Mr. O'Connor:

Q. Have you ever heard Anita Whitney advocate violence?

Mr. Harris: Objected to upon the ground that the question has already been asked and answered, and calling for the conclusion of the witness.

The Court: Sustained.

Mr. O'Connor:

Q. What have you heard Anita Whitney say about violence?

A. I have been associated with Miss Whitney for a great number of years and worked with her——

Mr. Harris: If the Court please, let the witness answer the question and not deliver an oration.

The Court: The witness was about to answer the question, so go right ahead now. Answer the question. Read it, Mr. Reporter.

(The Reporter reads question.)

Mr. O'Connor:

Q. At the time of your association with her, I might add.

A. As I said, I have been associated with her a number of years in this work, the work of the Socialist Party and the Communist Labor Party since its organization, and I have never known her to advocate in any way any kind of violence.

Mr. Harris: Just a second. That calls for the conclusion of the witness.

The Court: What have you heard her say? That is the question.

A. I say I never heard her say anything, any advocacy whatever of crime at all, or——

Mr. Harris: If your Honor please, just a minute.

A. (Continuing:) —or violating any of those charges with which she is charged.

[fol. 188] Mr. Harris: I submit the question has been asked and answered when he said "I have never heard her say anything."

Mr. O'Connor:

Q. No, no. If we are going to be fair with Miss Whitney, let's be entirely fair. Had you finished?

A. I had finished my statement.

The Court: Just a minute. We will have the question re-read.

(The Reporter reads the question.)

Mr. O'Connor: Go right on now, Mr. Taylor, and finish your answer.

A. I never heard her say anything or have I seen her do anything that would bring her or make her guilty within this statute.

Mr. Harris: If your Honor please, I move that be stricken out.

The Court: It may go out.

Mr. Harris: Just that kind of an answer from a party of the other side that we have to pick from——

The Court: Never mind. Read the question again, Mr. Reporter. Let's get an answer.

(The Reporter re-reads question.)

Mr. O'Connor: Of course, we contend, just to show how absurd it is not to permit our questions to be answered—we know, and the

gentlemen of the District Attorney's office know, too, that Miss Whitney never by word or deed advocated violence.

The Court: Now, we don't want any speeches, Mr. O'Connor. Let's ask this witness questions and have answers to them. That is all we are going to have now. Have the question read.

A. You can't answer that by "Yes" or "No." I have to explain it in some shape or form.

The Court: Well, what have you heard her say? That is the question, in reference to violence—I think was the question. Get Mr. O'Connor's own question.

(The Reporters reads.)

Mr. O'Connor: I will put this question and we will end the matter.

Q. Did you ever hear Anita Whitney say anything in favor of violence?

[fol. 189] Mr. Harris: To which we object upon the ground that it calls for the conclusion of the witness, as to what she said.

Mr. O'Connor: You know it is like that famous question, "Have you quit beating your mother? Answer me 'Yes' or 'No.'"

The Court: No, no, that analogy has no connection whatsoever. Let the objection be sustained to the last question.

Mr. O'Connor: Well, in view of your Honor's ruling, there is no further examination. There is no use in taking up the time of the jury.

The Court: Very well.

Mr. Harris: Call Mr. Dolsen.

[fol. 190] JOHN C. TAYLOR, recalled.

Direct examination resumed:

Mr. Harris: Mr. Taylor, take the stand. Mr. O'Connor and Mr. Pemberton, I respectfully request permission to ask Mr. Taylor some questions that I probably neglected to ask him yesterday on direct examination.

Mr. O'Connor: All right; go right ahead; certainly.

Mr. Pemberton: No objection.

Mr. Harris:

Q. Mr. Taylor, I believe that you informed me yesterday that Local Oakland of the Communist Labor Party adopted the Manifesto of the Communist International?

A. No.

Q. You did not so testify here?

A. No, I did not testify to that.

Q. You did state, to be technical, that they endorsed it, did you not?

A. No, I did not.

Q. Well, I will ask you now what, if anything, Local Oakland of the Communist Labor Party did in regard to the Manifesto of the Communist International that was adopted by the Congress of the Communist International at Moscow, March 2nd to 6th, 1919, and signed by Comrades C. Bokovsky, N. Lenine, M. Znovjev, L. Trotsky, F. Platten?

A. I said I was not a member of Local Oakland. I did not attend their meetings—at least, very often—but once in a while I attend; but I have not attended any lately, and I don't know whether they adopted that, or not.

Q. You were a member of what?

A. A member of Local Dimond.

Q. Local Dimond. You did attend the State Convention, however?

A. I did.

Q. And what, if anything, did the State Convention of the Communist Labor Party do in regard to the Manifesto of the Communist International which was adopted by the Congress of the Communist International Party at Moscow?

Mr. Pemberton: To which we object on the ground it is not the best evidence. It will speak for itself. If counsel have it reduced to writing, and the District Attorney has it—
[fol. 191] The Court: It may be overruled.

A. I don't remember that the convention took any specific action upon that, but they are, no doubt, thoroughly in accord with the principles of the Third International.

Mr. Pemberton: We move to strike out the answer—that is, that part of the answer “I have no doubt”—as not responsive to the question.

The Court: That may go out as not being responsive.

Mr. Harris:

Q. I understood that you were the secretary.

A. I was.

Q. I will show you “People's Exhibit No. 7,” which is the copy of “The World,” with the constitution of the Communist Labor Party of California, and ask you to look at it, Mr. Taylor, and ask you if that refreshes your recollection now as to what was done?

A. Indirectly through adopting the National platform, which in turn affiliated with the—or endorsed the principles of the Third International—why, of course, the convention did.

Q. Then you did adopt the International platform which had endorsed this, and adopted it?

Mr. Pemberton: Objected to on the ground that it calls for the conclusion of the witness.

The Court: I cannot hear that.

Mr. Pemberton: That objection was on the ground that it calls for the conclusion of the witness.

The Court: I heard the objection but I did not hear the question.

Mr. Pemberton: He has already stated the fact, your Honor.

Mr. Harris: We appreciate that we are dealing with a very unwilling witness, if the Court please.

The Court: Let me have the question; that is all.

Mr. O'Connor: We ask that the jury be instructed to disregard that remark. Here is a man under indictment, or under information, who is referred to as "an unwilling witness," and who has answered every question that he has been permitted to answer.

The Court: Let's have the question, now—just a moment—I want the question.

[fol. 192] Mr. Pemberton: He could have refused to answer anything and everything, if he had so chosen.

(The Reporter reads the question.)

The Court: You may answer the question.

A. Yes.

Mr. Harris: If the Court please, at this time I ask that the Manifesto be introduced in evidence as "People's Exhibit 1," I believe the number is.

The Court: Let it be admitted and marked "People's Exhibit 1."

Mr. O'Connor: Same objection, your Honor.

Mr. Pemberton: We wish to save our objection.

The Court: Very well. Let the record show the objection of the defendant, and the same may be overruled.

The Witness: Your Honor, I said—

The Court: Just a minute—and the Manifesto is admitted in evidence and marked "People's Exhibit 1," in accordance with the original marking for identification.

A. The Communist Manifesto contains a great deal of matter pertaining to tactics, and so forth, and they have included the whole thing, and we said we referred only to the principles of the Third International. Let them take out the principles of the Third International; that is what we referred to.

Mr. O'Connor: I did not get that.

A. Our platform says here, it describes the principles as laid down by the Communist Manifesto, but it does not say anything about the tactics, the tactics of the Third International, it ignores them completely.

Mr. Pemberton: Or the details.

The Witness: Only the plans.

Mr. Harris: I have not started to offer this as yet.

Q. I will ask you to look over this copy of "The World" dated Friday, November 14, 1919, and particularly that portion of it which is on page 7 and entitled "A report of the State Convention" and signed by John C. Taylor. What is that?

A. Ex-Secretary.

Q. Tell me whether or not that is the report of the convention [fol. 193] held in Oakland on November 9th, as given out over your signature (showing)?

A. That is the report as I wrote it.

Mr. Harris: If your Honor please, at this time I ask that this report be introduced in evidence, taking the appropriate number.

The Court: It may be admitted.

The Witness: May I ask a ruling on the other matter again?

The Court: It has already been ruled on.

The Witness: They entered something that we did not have.

The Court: You are giving testimony; you are not making the rulings.

Mr. Harris: With your permission, gentlemen, I would like to read it.

Mr. Pemberton: Subject to our objection, of course.

The Court: Very well, the objection may be deemed made and overruled.

Mr. O'Connor: Are you through with this witness now?

Mr. Harris: Would you prefer to have us get through with him?

Mr. O'Connor: Go right ahead.

Mr. Harris (reading): "The State Convention of the Communist Labor Party of America, which was called for November 9, was held at Loring Hall on Sunday last.

"The convention was thoroughly satisfactory from every point of view inasmuch as all the Locals that have affiliated themselves with the new party were fully represented, and beginning early we labored late until all the work that was laid out was fully covered."

Mr. Pemberton: If the Court please, I wish to save an objection to this. This isn't what I thought it was. We object to this on the ground that it is hearsay. It is a mere report of some individual of his opinions and conclusions. It is not any declaration of principles at all.

Mr. Harris: If your Honor please, it was the report of John C. Taylor as the ex-secretary.

Mr. Pemberton: This was not made under oath. The objection is that it is hearsay and conclusion.

Mr. Harris: I will proceed again, ladies and gentlemen of the [fol. 194] jury, with the facts. (Reading:)

"The convention was thoroughly satisfactory from every point of view inasmuch as all the Locals that have affiliated themselves with the new party were fully represented, and beginning early we labored late until all the work that was laid out was fully covered. "That which was accomplished between the hours of 10 in the morning and 10 at night takes the usual convention three days to put down on paper. This was due to the fact that we all of us were of one mind—we knew what we wanted and we got it. There was little bickering and a decided lack of parliamentarism, due, no doubt, to the absence of the parliamentarians.

"The convention was called to order by State Secretary Taylor by announcing that the 'First Convention of the Communist Party of California was now in session.'

"Comrade C. A. Tobey of Local Oakland was quickly chosen temporary chairman and J. C. Taylor temporary secretary.

"Comrade Tobey announced that he had prepared a long speech

"for the occasion, but refused to make it 'because we didn't have 'time,' and immediately called for the election of a credentials committee; Comrades Bauer, Friend, Whitney, Wilson and Ragsdale were nominated and elected."

Mr. O'Connor: Mr. Harris, isn't it a fact that—didn't you read that yesterday in the typewritten form?

Mr. Harris: I believe I did, but he apparently had elaborated upon this considerably, though. This is an elaboration, apparently, on the minutes that I read yesterday.

Mr. Pemberton: I renew my objection that it is hearsay; it is not within the minutes of the meeting, but just a newspaper report made out afterwards as a newspaper report by a newspaper reporter.

The Court: It is not apparently from a newspaper report, from the information that has been offered here. It is the report of the Secretary of the organization, is it not?

Mr. Harris: Yes, your Honor.

The Court: You may proceed. Let the objection be overruled.

[fol. 195] Mr. Harris: Yes, your Honor, it is. (Reading:)

"Comrade Tobey announced that he had prepared a long speech 'for the occasion, but refused to make it 'because we didn't have 'time,' and immediately called for the election of a credentials committee; Comrades Bauer, Friend, Whitney, Wilson and Ragsdale were nominated and elected. A recess was then ordered to give the credentials committee an opportunity to look into the credentials of the delegates.

"We wish at this time to call your attention to the fact that although we are mass-actionists, the credentials committee did its 'work with dispatch without the aid of any police force or 'white card systems.' This was due to the absence of the Non-Mass-Actionists.

"Without questioning 'their good faith' longer than ten minutes, all delegates were seated and the temporary officers made permanent.

"We next joined heartily in singing a couple of songs, and then elected our committees.

"Comrades Tobey, Dolsen, Milder, Bickel, and Coleman were elected to the Committee on Constitution and By-laws.

"Comrades Greist, Bauer, Alverson, Whitney, Eickhorn and Wendrich were placed upon the Resolutions Committee.

"The Committee on the Ways and Means was composed of the following members: Comrades Mrs. Milder, Wilson, Ragsdale, Smith and Adams.

"Comrades Mrs. Warwick, Sessions, Reed, Bickel and Snyder were nominated and elected on the Press and Propaganda Committee.

"Max Bedacht, our comrade and member of the National Executive Committee, happened to be with us and he was next called upon to report on matters pertaining to the National Movement. He spoke upon the efforts and prospects of unity between the Communist Labor Party and the Communist Party. He stated that our 'building up of a big strong revolutionary movement would be the greatest factor for bringing about an amalgamation. The police and the machine guns would accomplish the rest.

"A motion to adjourn till two o'clock for lunch and in order to give the committee time to make up their reports was offered and [fol. 196] "carried.

"On re-convening, the Committee on Constitution reported 'Not ready,' so the report of the Press Committee was received and adopted. Comrade Snyder read the report for the committee which favored a monthly bulletin, to be printed in 'The World'—the making of 'The World' the official organ of the Communist Labor Party of California—that we agitate for the O. B. U. and shop steward committees, and establish a uniform literature department with a publishing house for this coast and also a State Lyceum Bureau.

"Comrade Eric Smith, reporting for the Committee on Ways and Means, recommended a local organizer for San Francisco and one for Oakland, and a general field organizer for the State. The report was adopted.

"Comrade Kaspar Bauer was next called upon for a report of his committee—the Committee on Resolutions. Resolutions on Class War Prisoners, Workers' Control, Unity of Communist Parties, Industrial Unionism, and Hands Off of Russia policy were read and adopted.

"A tong war broke out when he read a resolution demanding that the Communist Labor Party lay greater stress on the ballot as a means of capturing the political machinery, as its capture 'can be of tremendous assistance to the workers in their struggle for emancipation; being fully convinced of the utter futility of obtaining any real measure of justice or freedom under officials elected by parties owned and controlled by the capitalist class.' It seemed to most of us that Comrade Bauer nearly dropped a monkey wrench in the machinery as the adoption of this resolution would have undone all that the Communist Labor Party convention at Chicago had put down in their platform and program, and again lined us up with the Socialist Party from which we had just escaped. After threshing out for the forty-ninth time this matter of tactics we adopted the program of our National Convention which clearly defines that the ballot is practically worthless as an instrument of emancipation and that we must look to organizing the workers industrially as our great weapon of offense and defense.

[fol. 197] "Comrade Dolsen then read the report of his Committee on Constitution and it was acted upon seriatim. Minor changes were made in it from time to time, but on the whole the committee can be congratulated in working out the new Constitution. "It is too long to give in detail, but it will appear in the next issue of 'The World' and in booklet form soon. It provides for a state executive committee of five with two alternates, a state secretary-treasurer with headquarters at Oakland, district organizers and a yearly convention which should elect delegates to the National Convention and elect the State Executive Committee and Secretary-Treasurer. This new arrangement is in keeping with the Constitution as adopted by our parent organization at the Chicago Convention.

"With the election of James H. Dolsen to fill the office of State

"Secretary-Treasurer and Comrades Ragsdale, Taylor, Bauer, Whitaker, and Tobey as members of our State Executive Committee, and Comrades Milder and Whitney as alternates, the work of our convention stood completed and we adjourned. The Constitution provides that we are to hold a State convention next April, at which time we will have an opportunity to see how our new Constitution works out. We are all hopeful that many of the ideas laid down therein will be developed and well under way by that time and that it will aid us in every way to become a wonderful force for the cause of the Revolution. Respectfully submitted,

"(Signed) John C. Taylor, Ex-Secretary."

Mr. Harris: I presume we can stipulate that this is "Ex-Secretary."

Mr. Pemberton: I have no doubt that it is, but that is for the jury to determine.

Mr. Harris: Very well. Will you stipulate, Mr. O'Connor, that that is "Ex-Secretary"?

Mr. O'Connor: Yes.

Mr. Harris:

Q. Mr. Taylor, you were in Chicago, were you?

A. I was.

[fol. 198] Q. At the convention?

A. Yes.

Q. I show you this song which has been introduced in evidence as "People's Exhibit No. 2." You are familiar with it, are you?

A. I am.

Q. Did you hear that song on the 9th day of November of this year—of last year, rather—at Loring Hall?

A. I did.

Q. Do you know where that song—how that song came to be sung at Loring Hall?

A. Why, mainly through my direction.

Q. Sir?

A. Chiefly through my own direction.

Q. Did you have a copy of it?

A. I did.

Q. Where did you obtain it?

A. I wrote them up myself.

Q. You had that song?

A. I did.

Q. Do you know whether that song was sung at the Chicago convention?

A. Yes, it was.

Q. Who introduced it there at the Chicago convention?

A. The first one was by Margaret Preedy, and written there at the time; and the second one was by Mrs. Harmon, of Kansas, who was also a delegate, and was written there at the convention.

Mr. O'Connor: Doesn't it seem that we are rather going far away to convict Miss Whitney—clear back to Chicago? Let's bring it closer to home.

The Court: It is now noon so we will adjourn until 2 o'clock. Ladies and gentlemen of the jury, you are admonished at this time not to converse among yourselves, or with any other person, upon any subject connected with the trial of this case, or to form or express an opinion thereon until the case is finally submitted to you.

(A recess was here taken until 2 o'clock p. m.)

Afternoon Session

The Court: People against Whitney. Will the counsel stipulate that all the jurors are present?

Mr. Calkins: Yes, your Honor.

Mr. O'Connor: Yes, your Honor.

The Court: You may proceed, then.

Mr. Harris: I believe Mr. Taylor was on the stand.

[fol. 199] JOHN C. TAYLOR recalled for further Direct Examination.

Mr. Harris: Will you read the last question, Mr. Reporter?

(The Reporter reads the last question and answer.)

Q. Who brought it to California, if you know?

A. Why, I think the words were printed in the different papers and received here.

Q. You led the singing of it at Loring Hall?

A. I did.

Q. Mr. Taylor, I will ask you whether or not the Communist Labor Party, you being one of the officials of that party, has a correspondence with Communist Parties outside of the United States of America.

Mr. Pemberton: We object to that as immaterial. I don't presume that it is claimed by you that political action—the statute of California relates to the political action of any other place than California, do you?

Mr. Harris: I am trying to show—my object being to show that this is a wide-spread movement.

Mr. Pemberton: Miss Whitney is not responsible for its wide-spread movement.

The Court: The question goes to the nature and character of the organization; that is what you have a right to show, but not as to any action outside of the jurisdiction of this court, other than to show the character and nature of an organization. That might be an issue—

The Witness: The only officials that would have anything to do with it outside of the United States would be the National office, and I am not a member of the National office at all.

Mr. Harris: Read that answer, Mr. Reporter, please.

(The Reporter reads answer.)

Q. Have you received communications from the Communist Party outside of the United States?

Mr. Pemberton: The question may be answered "Yes" or "No".

A. I may have received something from the Communist Party of Mexico. I don't know of any other.

Mr. Harris: Let me see the exhibit of "The World" of July 25th, Mr. Clerk.

Q. Mr. Taylor, did you, in your official capacity in connection with the Socialist Party obtain statements by or from the various [fol. 200] delegates to the Chicago convention as to the platform upon which they stood as set forth, such statements being set forth in "Plaintiff's Exhibit No. 6," which is "The World" dated July 25th of last year?

A. I don't know that I would call it a platform; they stated their positions in regard to a certain question that was being discussed at that time. Some of them gave those statements, and some did not.

Q. I don't understand what you mean.

A. You asked me if I received them, did you not?

Q. Yes.

A. I say some of the candidates elected to send in statements, and others did not.

Q. That is what I mean. When you say "some of the candidates made the statement and some did not," you did not have inserted here statements of candidates that they did not make, did you?

A. No sir.

Q. All the statements that were represented to have been made by the various candidates are in here; there are no insertions or elaborations of yours in there, are there; that is correct, is it?

A. Just as I received them they are.

Mr. Harris: I think you may cross-examine.

Mr. Pemberton: No cross-examination.

The Court: Now, in respect to those questions that the ruling was sustained by the Court, and as being set aside while another witness was on the stand.

Mr. Pemberton: What page was that?

The Court: 116.

Mr. Pemberton: May I take it up? Mr. O'Connor is a very sick man—I know it is against the rule to change counsel.

The Court: That is all right—go ahead, Mr. Pemberton.

Mr. Pemberton: I have them here. Have you ever heard Anita Whitney, or Charlotte A. Whitney, the defendant in this case, advocate violence?

Mr. Harris: Just a second, if the Court please—to which we object upon the ground that it is not proper cross-examination and

calls for the conclusion of the witness—particularly that it is not cross-examination.

[fol. 201] The Court: I don't believe it calls for the conclusion of the witness at all. The question is whether it would be proper on cross-examination. Yesterday it was sustained on that ground, but on looking over this transcript and reading the question, possibly I would not take it as a conclusion at all.

Mr. Harris: We are objecting to it upon two grounds, if the Court please, and I think we are entitled to have it sustained on either one, if your Honor sees fit.

The Court: The ground upon which it was sustained yesterday was that of calling for the conclusion of the witness, but I would not think that would be a proper ruling to make.

Mr. Harris: Then, as has often been said, for the sake of the record, I make that point.

The Court (continuing): On cross-examination of the witness, or is it the examination particularly that you claim is not cross-examination?

Mr. Harris: There is nothing brought out upon direct examination which would allow the asking of that question.

The Court: Rather than take up the time now, would this be satisfactory to counsel: If the Court should read the direct-examination. I will say frankly that I had in mind only the ground that I found in the record, as calling for the conclusion of the witness, and upon that ground I note once that it was the proper thing to sustain the objection, and for that reason reversed the ruling on these questions for that reason. Now, then, the further ground is presented at this time that it is not proper cross-examination, and if it is agreeable to counsel we can let the matter, as far as these questions are concerned, go over until Monday, or any other day, or for any other time, and in the meantime I will consider that it is direct-examination.

Mr. O'Connor: Let me suggest while the witness is on the stand that the witness answered the question, and that his answer be stricken out, then.

Mr. Pemberton: We can make him our witness for that purpose, with the permission of the Court. That will be the easiest way out [fol. 202] of it.

The Court: All right.

Mr. Pemberton:

Q. Have you ever heard the defendant in this case advocate violence?

The Court: In connection with the matter testified to, with regard to the Communist Labor Party, I might suggest that you add that.

Mr. Harris: We may register our objection, if the Court please, that it is incompetent, irrelevant, immaterial, and an improper way of expressing a negative, and calling for the conclusion of the witness.

The Court: Overruled. It may be answered.

A. No, I never have.

Mr. Pemberton:

Q. What, if anything, have you ever heard her say about violence of any character?

The Court: Will you connect it the way I suggested—in connection with the work of the Communist Labor Party?

Mr. Pemberton: Yes, in connection with the work of the Communist Labor Party.

Mr. Harris: To which, if the Court please, we object upon the same grounds that we have heretofore urged, and I presume the same ruling will be made?

The Court: Overruled.

A. I never heard her advocate violence in any shape or form.

The Court: I guess that covers it. You may be excused now. Will you need Mr. Taylor again?

Mr. O'Connor: We will not, no.

Mr. Harris: No.

Mr. O'Connor: Let me suggest to the Court: I want to say to the gentlemen that are now calling this witness that I am going to ask your Honor's indulgence for his cross-examination.

Mr. Calkins: I will state at this that the direct-examination of the witness, as he is called at this time, I will make every short, and on one subject only, and that Mr. O'Connor, if he is called, [fol. 203] could cross-examine him.

Mr. O'Connor: Then I assume that the subject is not the red flag?

Mr. Calkins: You will soon learn what the subject is. It won't work any hardship upon you, Mr. O'Connor.

[fol. 204] FENTON G. THOMPSON, a witness called on behalf of the People, being first duly sworn, testified as follows:

Direct examination.

Mr. Calkins:

Q. Your name is Fenton Thompson?

A. Yes.

Q. And you are an Inspector of Police of the City of Oakland?

A. Yes.

Q. Mr. Thompson, did you ever have a conversation with the witness who was called in this case, by the name of Ed. Condon?

A. Yes.

Q. In which you stated substantially, or in these words, that you had framed up—

Mr. O'Connor: Just a moment, your Honor.

The Court: Unless you get something objectionable at this time, now.

Mr. O'Connor: The objection is, if your Honor please, that it is an attempt to impeach their own witness.

The Court: There are two ways: there is a way of impeaching even your own witness; but it does not come that way, undoubtedly.

Mr. Calkins: If I might speak about that; I had not the slightest idea that counsel would be unwilling to have the District Attorney put his cards on the table and show every bit of evidence in this case, and that is what we are putting him on the stand for.

Mr. O'Connor: The cards should have been on the table yesterday afternoon, sir, before the gentleman left, which gave Mr. Thompson thirty-six or twenty-four hours to think over his testimony. It was Mr. Thompson's cue to come forth yesterday and say "That is a lie," and he stood there silent with not a word from him.

Mr. Calkins: Mr. Thompson was not called to the stand yesterday.

The Court: Counsel have answered it, and is the objection withdrawn?

Mr. O'Connor: The cards are on the table, are they? Well, it is cold now.

The Court: Read the question, Mr. Reporter.

(The Reporter reads the record.)

[fol. 205] Mr. Calkins:

Q. (Continuing:) —an incident in which a red cloth or flag was placed over an American flag in Loring Hall on the 9th day of November, 1919, in the City of Oakland?

A. I did not.

Q. Did you tell that witness at any time that you had a man to do that thing?

A. I did not.

Mr. Calkins: You may take the witness.

Mr. Pemberton: Cross-examination reserved until Mr. O'Connor's voice is better, if your Honor please.

The Court: Is that satisfactory?

Mr. Calkins: Well, that is in the discretion of the Court. I don't know but what there are two counsel here. Mr. O'Connor is able to make long speeches here. Why he should be unable to ask a few simple questions, I don't understand.

Mr. O'Connor: I did not expect Mr. Calkins to treat me with any more courtesy than he has Miss Whitney. But I will ask your Honor's indulgence, in view of what transpired yesterday, in view of the fact that their first witness is made a perjurer by their last witness, and that we be given an opportunity to cross-examine this man.

The Court: I understand the condition of your health, and if it

is your duty to do the cross-examining of this witness, I will give you that opportunity.

Mr. O'Connor: It is to be my duty to cross-examine this witness, your Honor.

The Court: I understand. No man in your condition of health could cross-examine a witness at this particular time.

Mr. O'Connor: It is only a question of my voice, your Honor.

Mr. Calkins: It will be Mr. O'Connor who questions the witness, then?

Mr. Pemberton: It will.

Mr. O'Connor: If I am able to.

The Court: Very well. You may be excused.

[fol. 206] J. A. RAGSDALE, a witness called on behalf of the People, being first duly sworn, testified as follows:

Direct examination.

Mr. Calkins:

Q. Your initials are "J. A."?

A. J. A. Ragsdale.

Q. You reside in San Francisco?

A. Yes sir.

Q. Were you present in Oakland at a meeting held in Loring Hall on the 9th day of November, 1919?

A. I was.

Q. What was the purpose of that meeting, if you know?

A. It was a State Convention of the Communist Labor Party.

Q. Were you in attendance as a delegate at that meeting?

A. I was.

Q. From what Local, if any?

A. Local San Francisco.

Q. Where are the headquarters of Local San Francisco?

A. They were at that time at 225 Valencia Street.

Q. Did you attend the whole of that meeting?

A. I did.

Q. At Loring Hall, was the one I referred to.

A. Yes.

Q. You were then secretary of Local San Francisco, were you not?

A. I was.

Q. Did you see, at that meeting at Loring Hall on November 9, 1919, Miss Whitney, the defendant in this case?

A. Yes.

Q. She was in attendance there at the session of that meeting?

A. Well, I cannot say just how long she was there. I don't know the exact time she arrived, nor when she left, but I saw her there during the day.

Q. Both afternoon and morning sessions?

A. Yes.

Q. Did you serve on any committees on that meeting?

A. I was elected to the Credentials Committee and the Ways and Means Committee.

Q. And you served with Miss Whitney on the Credentials Committee?

A. Yes.

Q. Were you subsequently elected to any position in the State organization?

A. I was elected a member of the State Executive Committee.

Q. Do you know whether or not the State Executive Committee has, subsequent to that time, held meetings?

[fol. 207] A. It held two meetings.

Q. Will you kindly state where those were?

A. At San Jose and San Francisco.

Q. Will you state whether or not Miss Whitney was present at the San Jose meeting?

A. She was.

Q. She was?

A. Yes.

Q. Can you state whether or not she was present at the San Francisco meeting?

A. She was there also.

Q. Do you know whether or not Miss Whitney is a member of the Executive Committee?

A. She is—well, not regularly a member; she is known as an alternate member, to serve in case one of the regular members should not be present.

Q. As an alternate member, did she sit with the committee in its deliberations at these meetings?

A. Well, the State Constitution provides that alternates shall be present, but they are not supposed to take any active part in the meeting.

Q. If a member of the State Executive Committee is absent, do the alternates participate?

A. They do, yes.

Q. Were any members of the State Committee absent at either of these meetings?

A. I believe one member was absent at each meeting.

Mr. Calkins: That is all.

Mr. Pemberton: No questions.

[fol. 208] Mr. Harris: May it please your Honor, at this time we have evidence to offer in support of the fact that we are unable to locate a witness by the name of J. G. Reed, and I have submitted to Mr. O'Connor the People's subpoena showing that we are unable to locate him, and he has kindly consented or stipulated that we might read the testimony, and not put on the proof that we are unable to locate him.

Mr. O'Connor: That is true.

Mr. Harris: With your Honor's permission, I would like to read the testimony of J. G. Reed, called as a witness on behalf of the People. (Reading:)

"J. G. REED, called as a witness on behalf of the People, being first duly sworn, testified as follows:

"Direct examination by Mr. Snook:

"Q. Your name is J. G. Reed?

"A. Yes sir.

"Q. Where do you live?

"A. 817 Grove.

"Q. Do you know Charlotte A. Whitney, the defendant in this case?

"A. Yes sir.

"Q. Were you present at a convention of the Communist Labor Party of the State of California on Nov. 9, 1919, at Loring Hall, in the City of Oakland?

"A. Yes sir.

"Q. Was Charlotte A. Whitney, the defendant in this case, present?

"A. Yes sir.

"Q. I'll show you a document and ask you if that is your signature?

"A. That is my signature.

"Q. A document purporting to be a list of delegates from Local Oakland, Communist Labor Party, to the California Communist Labor Party Convention.

"A. Yes sir.

"Q. You notice that it bears the name of Miss Anita Whitney; is that the defendant in this case?

"A. Yes sir.

"Q. Was that document forwarded by you to the convention?

"A. Yes sir.

"Mr. Snook: I offer it in evidence as People's Exhibit 3.

"The Court: Read it into the record."

At the end of this, we might offer these in evidence, Mr. O'Connor, [fol. 209] without bringing the Clerk of the Police Court here?

Mr. O'Connor: Yes, certainly.

Mr. Harris: The Court had it read into the record. (Continuing reading:)

"Mr. Snook: I notice you signed it as Secretary, secretary of what?

"A. Why, Local Oakland.

"Q. Local Oakland of the Communist Labor Party?

"A. Yes sir.

"Q. You were such secretary?

"A. Yes sir.

"Mr. Snook: You may cross-examine.

"The Court: You had better read it into the record.

"Mr. Snook: In the upper lefthand corner is a picture of the
 "world, with two joined hands, Socialist Party, Workers of the World
 "Unite, Communist Labor Party, successors to Local Oakland Social-
 "ist Party, 1020 Broadway, Phone Oakland 5493, and on the bottom
 "is the signature of J. G. Reed.

"The Court: That may be marked People's Exhibit 3."

Mr. Harris: People's Exhibit 3 is as follows:

"Socialist Party Workers of the World Unite

"15

"Communist Labor Party, Successors to Local Oakland Socialist
 "Party

"1020 Broadway

"Phone Oakland 5493

"Oakland, Calif., Nov. 8, 1919.

"California Communist Labor Party Convention, Loring Hall, Oak-
 "land, California.

"GREETINGS, COMRADES:

"This is to inform you that Local Oakland, Communist Labor
 "Party, with 286 members in good standing, has elected the follow-
 "ing sixteen comrades to sit in this convention in accordance with
 "the convention call, i. e. one delegate for each local and one addi-
 "tional delegate for each 25 members in good standing:

"1. Mrs. Gertrude Warwick,

"2. John G. Wieler,

"3. John E. Snyder,

"4. Eleanor Wendland,

"5. Helen Walker,

"6. Forrest Walker,

"7. Louis N. De Vinney,

"8. John R. Noyes,

"9. Carl Garden,

"10. John Buchanan,

"11. C. Alward Tobey,

"12. Miss Anita Whitney,

[fol. 210] "13. Norman H. Talentire,

"14. Paul C. Bickel,

"15. P. B. Cowdery—Alverson alternate,

"16. J. G. Reed.

"Faternally yours, J. G. Reed, Secretary.

"Mr. Snook: You may cross-examine."

Mr. Harris: Do you desire to read your cross-examination?

Mr. Pemberton: No, Mr. Harris, you read very nicely. Go ahead, if you please.

Mr. Harris (continuing reading):

"Cross-examination by Mr. Pemberton:

"Q. At that time the Communist Labor Party had not been organized in this State?

"A. No sir, it hadn't.

"Q. Then you miscalled that Communist Labor Party when it was really a Local of the Socialist Labor Party?

"A. I couldn't have been a member of the Communist Labor Party until it was organized. It wasn't organized. Nationally, yes, it was organized, nationally, but not in the State.

"Q. Then this Local that sent up these delegates and these credentials was really a Local of the old Socialist Party, was it not?

"A. No, I don't think so because we voted to withdraw from the Socialist Party on account of a dispute.

"Q. What dispute?

"A. Why, it was a dispute over technicalities and over principles.

"Q. Not over principles of considerable importance?

"A. Why, not considerably, no.

"Mr. Pemberton: That is all.

"The Court:

"Q. What caused the Socialist Local to elect these delegates; was there anything that transpired and called to your attention by any superior body than yours? How did you come to elect them, how did you know that there was going to be a State organization?

"A. Why, I think, as far as I know, that Local San Francisco of the Communist Party, of the Communist Labor Party or Socialist Party, I don't know which, called a convention to decide whether we wanted such organization or not, and to form another.

[fol. 211] "Q. Then your Local received a communication from some other body?

"A. Yes.

"Q. Proposing a State organization of the Communistic Labor Party?

"A. Yes sir. All of the Socialist secretaries got it, and at that time I was the Socialist secretary.

"Q. Upon the strength of that communication, your Local selected these representatives for the purpose of becoming members of that State organization?

"A. I think that was the whole thing. The whole thing was to map out a change to see—well, to see if we wanted such an organization in California.

"The Court: Is that all?

"Mr. Pemberton:

"Q. You were one of the delegates yourself?

"A. Yes sir.

"Q. You took part in that convention?

"A. I sure did.

"Q. You assisted in the organization of the Communist Labor Party?

"A. As much as any other member, yes.

"Q. Have you been arrested therefor?

"A. I don't think I have, no.

"Mr. Pemberton: That is all.

"Mr. Snook:

"Q. Prior to this convention, your Local had already endorsed the Communist Labor Party and withdrawn from the Socialist Party, had it not?

"A. Yes sir. We endorsed the Communist Labor Party. We couldn't join the International organization that had no joint State organization. For that reason, I don't think we were members of any Communist Party, Communist Labor Party."

Mr. Harris: That must be meant for a question there.

Mr. Pemberton: Yes; read it as it was intended, Mr. Harris.

Mr. Harris (reading):

"Q. But you had already withdrawn from the Socialist Party?

"A. Yes sir.

"Mr. Snook: That is all.

"The Court:

"Q. Where did you get your information from that you couldn't become a member of the International Party? Had you not organized a State organization?

[fol. 212] "A. I think as far as I know——

"Q. Why do you always say 'I think,' don't you know?

"A. I got a notice from the International Communist Labor Party.

"Q. That is what I have been trying to find out all the time, whether you could not have been in communication with the International Communist Party after you left the Socialist Party.

"A. We got a notice stating the State affairs would be organized in this State.

"Q. Was there any effort made by your Local when you withdrew from the Socialist Party to become a member of the International Communist Party?

"A. No sir, we did not.

"Q. Did you communicate first with the International Party, or write the International Party, communicate with the International Communist Labor Party.

"A. I told them, I sent a telegram telling them that we dropped out of the Socialist Labor Party.

"Q. How did you know who to telegraph to?

"A. Why, the dispute was running for about six months, and all the papers had it. We got official documents from the Socialist Party stating the cause of the split and everything.

"Q. I'm asking you how did you know to communicate by telegraph to the International Communist Labor Party?

"A. We got communications from them."

Mr. Harris: I presume, although there is a space for a question here, that must be a question. You will stipulate that I may read it as such?

Mr. Pemberton: Just read it as it was evidently intended; if there is a little error in the typewriting, just read it as it should be, Mr. Harris.

Mr. Harris (reading:)

"Q. Then you had been in communication with the International Communist Labor — for some time prior to the time you withdrew from the Socialist Labor Party?

"A. We were the left wing group, yes.

"Q. Have you got any of those communications in your possession?

"A. No sir.

[fol. 213] "Q. Have you got anything in your possession concerning the principles of the International Communist Labor Party which your Local wanted to join with?

"A. It was all printed in 'The World.'

"Q. All printed in 'The World'?

"A. Yes.

"Q. Do you know which copy of 'The World'?

"A. I do not.

"Mr. Snook:

"Q. That constitution that was adopted in the State Convention was also printed in 'The World'?

"A. It was.

"Q. That is that constitution, that copy that appears in 'The World.' That is the constitution of the California Convention?

"A. Yes sir.

"Q. Of the Communist Labor Party of the State of California?

"A. Yes sir.

"The Court: People's Exhibit 2.

"A. No, not that. That is the Manifesto. That is the Manifesto of the third International of Moscow, International of the Socialist and Communist Party. That has nothing to do with our organization, other than we endorsed it, I think.

"Q. At this State convention?

"A. The International office endorsed it."

Mr. Pemberton: I really think that should be "National office"; I think the reporter must have meant that.

Mr. Harris: Possibly so. (Reading:)

"Your Local that you organized, this State organization, is a branch of the International organization?

"A. We haven't received any charter.

"Q. Is that what transpired there at this meeting at Loring Hall?

"A. That State organization.

"Q. Are you independent?

"A. Independent.

"Q. Of every other organization?

"A. Yes, of every other organization. Not a member of the organization until we get a charter.

"Q. Have you made application for a charter?

"A. We have not put in an application as yet.

"Q. Why not?

"A. The organization—well, I can't tell. That organization has got to pass on everything.

"Q. What organization?

"A. Local Oakland.

[fol. 214] "Q. You were the representative, were you, to this State organization?

"A. I sure was.

"Q. Have you reported that to your Local body, the result of that?

"A. I don't know whether we had a meeting or not.

"Q. Why, how long ago is it that this State organization was completed?

"A. About a month. Let's see, the first of September—well, about five weeks ago.

"Q. You were secretary of your Local at that time?

"A. Yes.

"Q. Why do you say you don't know whether or not you have a meeting of your body?"—I guess that should be "had," that would be the proper word, I suppose; that is apparently a mistake.

Mr. Pemberton: Yes, undoubtedly.

Mr. Harris (continuing reading):

"had a meeting of your body since that time?

"A. I will have to look that up.

"A. What is the matter with your memory, have you forgotten it?" That is apparently a question there, it should be a question.

Mr. Pemberton: If you say it is, all right.

Mr. Harris (continuing reading):

"Q. What is the matter with your memory, have you forgotten it?

"A. Just wait a minute, I have forgotten it.

"Q. Could they have a meeting without your being present?

"A. I have been present at every regular meeting on meeting nights.

"Q. Have you got in your possession the records, the books that the Local keeps, as secretary?

"A. No sir.

"Q. Where are they?

"A. I don't know; they were taken away from me.

"Q. By whom?

"A. I missed them after the raid upon our headquarters.

"Q. Where were your headquarters?

"A. 531 11th Street.

"Q. When was that, the night of the 11th of November?

"A. Yes sir.

"Q. In the event that a meeting was called, would you send out the call?

"A. Would I send out the call? Yes sir.

"Q. Under orders from the presiding officer?

"A. Yes sir.

[fol. 215] "Q. Have you sent out a call for a meeting of your Local body since the State organization took place at Loring Hall, about which you testified a moment ago?

"A. Yes, we have had a meeting, I think.

"Q. You think you have had a meeting?

"A. Yes.

"Q. At that meeting did the delegates report the result of the State organization?

"A. No. We had a very short meeting because of the business of getting out these Bazaar letters for the local papers, so we didn't have a long meeting.

"Q. I didn't ask you whether the meeting was long or short. You are trying to evade answering my questions.

"A. I am not evading anything.

"Q. I am asking you if you had a meeting.

"A. Yes, we had a meeting.

"Q. I ask you again whether a report was made at the meeting?

"A. No report was made.

"Q. Why didn't you say so. Now, there has never been a report to the Local body concerning the alleged State organization that took place at Loring Hall, as far as you know?

"A. As far as I know, yes.

"The Court: Is that all, gentlemen?

"Mr. Snook:

"Q. You say the constitution adopted by the State convention was published in 'The World'?

"A. I think so, yes.

"Q. Was the constitution adopted by the International convention published in 'The World'?" There you will notice the word "International" is used again.

Mr. Pemberton: I think the reporter must have got it "International" in there by mistake.

The Court: I think it would be well if we took the customary recess. Ladies and gentlemen of the jury, you are admonished at this time not to converse among yourselves or with any other person upon any subject connected with the trial of this case, or to form or express an opinion thereon until the case is finally submitted to you. Let the officers be sworn.

Mr. Harris: We will let this reporter copy it as "National," then.
[fol. 216] (Thereupon a recess at 3.30 p. m. was taken, and the jury returned at 3.45 p. m.)

The Court: Will counsel stipulate that all the jurors are present?

Mr. Calkins: We will so stipulate.

Mr. Pemberton: Yes, your Honor.

The Court: So stipulated by counsel. Let the record show that, then, and you may proceed with the reading of the transcript that you were engaged in doing, Mr. Harris, when we adjourned, or recessed, rather.

Mr. Harris (continuing reading:)

"I'll show you a copy of 'The World.' That is the State.

"Q. Of Friday, November 21st, 1919, Constitution of the Communist Labor Party of California.

"A. Yes sir.

"Q. That is the constitution that was adopted at this convention of November 9th?

"A. Yes sir.

"Q. Now, I'll show you in the same copy of 'The World,' Platform and Program of the Communist Labor Party, starting out " 'The Communist Labor Party of America declares itself,' etc. That "is the constitution of the International body, is it not?

"A. Yes sir.

"Q. That is the platform and program of the International body?

"A. Yes sir.

"Q. And the constitution follows it?

"A. Yes sir.

"Q. And 'The World' is the official paper, is it not, of the Local "Oakland Communist Labor Party?

"A. Yes sir. Of this Local organization.

"Q. That is your name printed here as organizer on Page 8?

"A. I am acting organizer.

"Q. You are the acting organizer?

"A. I am acting organizer.

"Mr. Snook: I offer in evidence, if the Court please, the Platform and Program and constitution of the Communist Labor Party

of the United States of America, as it appears in this issue of 'The World' of Friday, November 21st, 1919, and the constitution of the Communist Labor Party of California as it appears in 'The World' of the same date. I ask that it be stipulated to be con-
[fol. 217] sidered read into the record.

"Mr. Pemberton: That is all right. Have you a copy of it for us?

"Mr. Snook: I believe that I have it here.

"Mr. Pemberton: Do you understand it after you have read it?

"Mr. Snook: I understand some of it.

"Mr. Pemberton: So do I. That's all I know about it.

"The Court: It is admitted in evidence and will be marked "People's Exhibit 4. I am going to separate the two constitutions, mark one People's Exhibit 4 and the other People's Exhibit 5.

"Mr. Snook: Yes.

"The Court: The so-called State constitution will be People's Exhibit 4, and the National Program People's Exhibit 5, and it will be copied into the record.

"PEOPLE'S EXHIBIT 4 TO REED'S TESTIMONY

is as follows:

"Constitution of the Communist Labor Party of California

"Article I

"Name and Affiliation

"Section 1. The name of this organization shall be The Communist Labor Party of California.

"Section 2. It shall be affiliated with the Communist Labor Party of the U. S. of America and subscribe to its Program, Platform, and Constitution. Through this affiliation it shall be joined with the Communist International of Moscow.

"Article II

"Membership

"Section 1. Qualifications for membership in this organization shall be those prescribed in the National Constitution.

"Section 2. Any qualified person desiring to join this organization shall fill out the application card provided by the national organization. The applicant must be proposed for membership by a party member in good standing. On and after January 1, 1920, no applicant shall be accepted unless he pays at least one month's dues in advance besides the initiation fee. No applicant shall be
[fol. 218] made a party member until he has read the Platform, Program and Constitution. Locals shall require applicants to at-

"tend the meeting at which the application is to be presented. If
 "the application is approved by the Local meeting the party pledge
 "(on the application) shall be read to the applicant and he shall
 "be asked if he has read and is willing to abide by the Platform,
 "Program and Constitution of the Party. Upon an affirmative
 "answer, the presiding officer shall declare the applicant a member
 "of the Communist Labor Party of America. If the applicant is
 "unable to attend the meeting, he shall state the reason in writing.
 "The Local may thereon excuse him and deputize a member to
 "carry out the above procedure where convenient for the applicant.
 "In the case of Members-at-Large, the State Secretary-Treasurer or
 "a member deputed by him, or the member proposing the appli-
 "cant, shall carry out the above procedure. The intent of this para-
 "graph shall be that no person shall be permitted to join the organi-
 "zation who does not thoroughly understand its principles and ac-
 "cept its Platform, Program and Constitution.

"Upon compliance with the above procedure the Secretary shall
 "issue the applicant a membership card with stamps affixed as pro-
 "vided by the National organization.

"Section 3. Any member of a Local desiring to transfer his mem-
 "bership to another Local within the state may do so upon presenta-
 "tion of his membership card showing him to be in good standing.
 "If the application for transfer is approved by the Local meeting,
 "the Secretary shall thereupon notify the Secretary of the Local
 "from which the applicant has transferred, who shall then note the
 "transfer upon his records and take the name off his membership
 "roll.

"Section 4. Any qualified person desiring to join the organiza-
 "tion and residing in an unorganized locality or who has no regular
 "residence may join as a Member-at-Large by sending his application
 "properly filled out to the State Secretary-Treasurer, accompanied
 "by the payment in advance of the initiation fee and at least three
 "months' dues. Upon approval of such application by the State Ex-
 "ecutive Committee, the State Secretary-Treasurer shall thereupon
 "issue the applicant a membership card with stamps affixed as pro-
 "[fol. 219] "vided by the national organization.

Article III

Organization

"Section 1. This organization shall have exclusive jurisdiction
 "over all party members residing within the State, subject to the
 "provisions of the National Constitution.

"Section 2. The affairs of this organization shall be administered
 "by a State Executive Committee, State Secretary-Treasurer; County,
 "City and Local units; Party Conventions, general vote of the mem-
 "bership, and in such other ways as are in accordance with this con-
 "stitution.

Article IV

State Executive Committee

"Section 1. The State Executive Committee shall have general charge of the work of the organization.

"Section 2. The State Executive Committee shall consist of five (5) members who shall be elected by the Annual State Convention for a term of one (1) year.

"At the time of their election, the convention shall also elect a first and second alternate for the same term.

"Section 3. The alternates, in their order, shall act as members of the committee in case of the absence, disability, disqualification or withdrawal of any of the regular members. The alternates shall be notified of all meetings of the committee and shall be entitled to participate therein with a voice but no vote except as above provided. The alternates shall be included in all correspondence to the committee from the State office.

"Section 5. Members and alternates to the State Executive Committee shall be allowed their actual traveling expenses in attending committee meetings, out of the treasury.

"Section 6. The State Executive Committee, upon its election by the Annual State Convention, shall meet together and organize by electing a permanent Chairman. The State Secretary-Treasurer shall act as secretary to the committee.

"Section 7. The State Executive Committee shall meet at least [fol. 220] "once a month at a regular place and day as decided upon by the committee. The regular meeting shall be postponed for not exceeding seven (7) days before the regular meeting date. Special meetings shall be called by the State Secretary-Treasurer upon the written request of three (3) members of the committee. Meetings shall be open to party members in good standing. Notices of the meetings shall be given in the party press a week in advance. Each member and alternate shall receive notification of the committee meetings at least four (4) days in advance of the meeting from the State Secretary-Treasurer.

"Section 8. The State Executive Committee shall supervise, direct and assist the work of the State Secretary-Treasurer; receive and pass upon his reports; conduct the audit of his accounts; supervise the issuance and count of Party referenda; and be the legal custodian of all property in the possession or under the control of the Communist Labor Party of California.

"Section 9. The State Executive Committee shall pass upon all applications for charters and Memberships-at-Large. The Committee shall have authority to suspend or revoke the charter of any Local for a violation of the state or national constitution provided

"the Local be notified of the charges with a citation of the clauses in the constitution violated, at least 10 days in advance and be granted the opportunity of presenting its side of the controversy to the committee. No charter may be suspended or revoked unless at least four members of the committee vote for such action. Such revocation or suspension shall not take effect until 15 days from the committee decision. If two or more other Locals representing at least 10 per cent of the State membership including that of the Local involved, notify the State Secretary-Treasurer within this period of their desire to have the committee action submitted to referendum, he shall at once prepare and send out to all Locals and Members-at-Large a referendum in the following form:

"Shall the action of the State Executive Committee in suspending (Revoking) the Charter of Local — be sustained? Yes.
"No.

[fol. 221] "The Local involved shall be allowed to vote upon this Referendum, but to take no other part in party affairs until the vote shall have been tabulated by the State Executive Committee. Its ballots shall be counted as provided in the section on Referenda, but they shall be also delivered in a sealed package to the State Secretary-Treasurer before the committee meeting, at which he returns from the Locals will be canvassed. The Local shall be entitled to a watcher at the canvass and its sealed package of ballots shall not be opened until the canvass officially begins. If a majority of all the votes cast are in favor of sustaining the action of the committee, the suspension or revocation of charter is immediately effective and there shall be no further appeal. If a majority of the votes are against the action of the committee, the Local shall be immediately re-instated as in continuous good standing. The State Executive Committee and the Local Concerned shall each have the right to a statement of not over 350 words which shall be printed upon one side of the ballot.

"Section 10. The State Executive Committee shall pass upon the employment of organizers or speakers available for party work in the State and fix their rates of compensation.

"Section 11. The State Executive Committee may propose Referenda to the party membership for changes or additions to the State Constitution, provided at least three members approve the subject-matter of the referendum and their approval is entered with a copy of the subject-matter in the minutes. The members proposing the referendum shall have the right to a statement not exceeding 350 words, and if any member of the Committee opposes it, he may submit a statement of equal length. Such statement shall be printed, if possible, on one side of the ballot, otherwise on a special sheet, accompanying the ballot. The referendum ballot shall be given in this form:

"Change (or addition) proposed to the State Constitution of the Communist Labor Party of California proposed by the following

[fol. 222] "members of the State Executive Committee. (Insert names)

"Put a cross before the one you prefer.

"Text of present Constitution X

"Proposed change. (Or addition) X

"Argument against the change.

"Argument for the change.

"Section 12. The State Executive Committee shall have the right "to discharge the Secretary-Treasurer upon vote for such discharge "by four (4) members. He may not be discharged except by a "special meeting of the committee, of which he shall be notified at "least one week in advance with a copy of the charges, specifying "the cause of action. He shall be given a fair opportunity for pre- "sented his defense to the committee. The call for such special "meeting shall be issued by the chairman upon application of three "(3) members (which may include himself.) In case of such dis- "charge, the committee shall have the authority to employ a new "secretary-treasurer to serve until the next annual convention.

"Section 13. When charges are brought against any State official "or a member of the State Executive Committee, the following pro- "cedure shall be followed unless otherwise provided for in this con- "stitution. The charges shall be filed with the State Executive Com- "mittee, through either the State Secretary Treasurer or State Chair- "man, who shall thereupon notify the members of the committee of "the same and set the date for a special meeting for their considera- "tion. The charges shall be in writing, signed by those bringing the "charges, specifying the time and place of the offense, the provisions "of the constitution violated or the injury done the party, and such "other details as may be necessary to enable the defendant to provide "his defense. If a member or members of the State Executive Com- "mittee or the State Secretary-Treasurer be so charged, they shall be "barred from judging the case. The remaining members, together "with the alternates as provided in section —, shall constitute the "trial committee. The members charged shall be granted a full "hearing and fair trial. The sessions of the co-trial committee shall "be open to party members in good standing. The decision of the "[fol. 223] "trial committee shall be final, subject to a referendum "which must be instituted within fifteen (15) days of the decision. "The decision shall become effective at the end of fifteen (15) "days, unless such referendum be instituted, in which case it shall "be suspended until the completion of the vote. In such case the "accused member or officials shall retain the privileges of party mem- "bership but shall be suspended from office pending the result of "the referendum, and the remaining members of the State Execu- "tive Committee shall appoint their temporary successors.

"Section 14. The State Executive Committee shall have the right "to appoint members to fill vacancies in official positions which are "not otherwise provided for in this constitution.

Article V

State Secretary-Treasurer

"Section 1. The State Secretary-Treasurer shall be elected by "the Annual State convention for a term of one year. He shall be "elected by a majority vote of the convention. He may be removed "at any time by a vote of four (4) members of the State Executive "Committee, as provided in Article 4, Section 12; or by referendum "vote of the membership.

"Section 2. The State Secretary-Treasurer shall receive not to ex- "ceed \$35.00 a week, the exact sum to be fixed by the State Execu- "tive Committee. He shall furnish a bond for at least \$1,000.00, "to be approved by the State Executive Committee, which shall de- "termine the exact amount. The expense of the bond shall be borne "by the organization. Failure to secure such bond within (30) days "of his election may forfeit the position at the discretion of the State "Executive Committee.

"Section 3. The State Secretary-Treasurer shall have charge of "all affairs of the State office, subject to the direction of the State "Executive Committee; he shall conduct the correspondence of the "state office; sign and issue charters and membership cards for "Mem- "bers-at-Large after their approval by the State Executive Commit- "tee; organize the distribution and sale of party literature; endeavor "to organize the unorganized localities and to strengthen the organ- "ized; make such official reports and carry out such duties as are im- "[fol. 224] "posed upon him by the National Constitution; report "the minutes of the State Executive Committee and render an item- "ized account monthly of the receipts and expenditures of the state "office and a monthly summary of its activities in such organs of "the party as the State Executive Committee may direct annually "render to the state convention a full account of his administration "of the party affairs; keep a record of the party membership and so "far as possible of sympathizers; attend to the routine of speakers "and organizers; and do such other work as may be necessary to the "progress of the movement or required of him by the State Execu- "tive Committee.

"Section 4. The State Secretary-Treasurer shall, together with the "Chairman of the State Executive Committee, sign in behalf of the "Party, all public statements and documents of the state organiza- "tion. They shall be the official representatives of the organization, "subject to the provisions of this constitution.

"Section 5. The State Secretary-Treasurer during his term of office "shall be a Member-at-Large. He shall be subject in party disci- "pline to the State Executive Committee.

"Section 6. The State Secretary-Treasurer shall be ineligible to "membership on the State Executive Committee, or to a nomination "for political office.

"Section 7. The same member shall not hold the position of State Secretary-Treasurer for more than two (2) consecutive terms.

"Section 8. The State Secretary-Treasurer, with the approval of the State Executive Committee, shall have the right to appoint suitable persons as district organizers; provided that no person shall be appointed to such position over the protest of the Locals in the district except by vote of at least four (4) members of the committee.

"Article VI

"State Conventions

"Section 1. An annual State convention of the party shall be held in the month of April, the exact date and place to be determined by the State Executive Committee.

"Section 2. Special conventions may be held at any time on vote [fol. 225] "of the general membership or on call by four (4) members of the State Executive Committee. The business of special conventions shall be confined to that specified in the call, unless two-thirds of the convention decide otherwise.

"Section 3. The Annual State Convention shall elect the State Secretary-Treasurer, the State Executive Committee, and the delegates to the Annual National Convention, in the order named, and transact such other business as may come before it. It shall have the right to propose alterations and additions to the state constitution and such changes shall become effective thirty (30) days from the ending of the convention, unless contested by a referendum. If a referendum is instituted, the changes effected thereby shall not be in effect until the referendum has been completed. The vote in such referendum shall be for or against the proposal of the convention, and the ballots shall contain the old and the new sections. The convention, before adjournment, shall elect a committee to prepare a statement in behalf of the changes in case of a contesting referendum; this committee shall be entitled to a statement not exceeding 350 words and the Local instituting the referendum shall have the same privilege.

"Section 4. No State Convention may transact business unless at least 50 per cent of the total number of delegates apportioned to the Locals of the State are present.

"Section 5. The basis of representation in the State convention shall be the Locals. Each Local shall be allowed one (1) delegate and one (1) delegate additional for each fifty (50) members of major fraction thereof in good standing.

"Section 6. Representation shall be based upon the average number of due stamps purchased by each Local from the State office during the year up to within two (2) months of the opening of the convention. The State Secretary-Treasurer shall send out the

"call for the convention thirty days preceding the date set. In the
 "call he shall notify each Local of the delegates it will be allowed
 "and enclose a form in duplicate for the credentials. The rules
 "of procedure for the state convention shall be made and published
 "by the State Executive Committee at least two weeks before it is
 "[fol. 226] "held; these rules to be subject to the appeal of the Con-
 "vention.

"Section 7. Delegates to the State Convention shall be allowed
 "their actual transportation expenses in attending it.

"Section 81. Upon notification of its apportionment, each Local
 "shall issue a call for a special meeting, of which every member
 "shall be notified, for the purpose of selecting its delegates. Elec-
 "tion of delegates shall be by majority vote and only members in
 "good standing shall be allowed to vote or be elected.

"Section 9. The transportation expenses of the delegates to and
 "from the State conventions shall be borne pro-rata by the Locals
 "according to their apportionment of delegates thereto. The State
 "Secretary-Treasurer shall estimate this expense and pro-rata it to
 "each Local in a statement accompanying the call for the election
 "of delegates. Each delegate shall file with his credentials the re-
 "ceipt of the State Secretary-Treasurer for the payment by such dele-
 "gate of his pro-rata share of the expense as above determined. No
 "credential shall be accepted unless such payment has been made.

"Article VIII

"Local Organizations

"Section 1. Seven or more persons subscribing to the Platform,
 "Program and Constitution of the Communist Labor Party may or-
 "ganize a Local upon the approval of their application for a charter
 "by the State Executive Committee.

"Section 2. Not more than one (1) Local shall be chartered in
 "any city or town after the granting of charters to the Locals partici-
 "pating in this convention.

"Section 3. Locals may subdivide into branches of seven (7)
 "members or more for purposes of administrative efficiency. Lan-
 "guage branches other than English-speaking branches, may or-
 "ganize separately in branches, using their own language.

"Section 4. Each Local shall hold at least one (1) business meet-
 "ing monthly.

"Section 5. The officers of a Local shall be: Chairman; Recording
 "and Corresponding Secretary; Financial Secretary; Treasurer; Or-
 "ganizer; Literature Agent. These offices may be combined, or com-
 "[fol. 227] "mittees substituted as the Local may desire.

"Section 6. The secretary of each Local shall, upon blanks provided for that purpose, make such reports from time to time of the condition and activities of his Local as may be required of him by the State Secretary-Treasurer under directions of the State Executive Committee. Failure to make such report shall be cause for the suspension of charter of the Local by the State Executive Committee, subject to the provisions of Section 9, Article 3, of this constitution. The Local secretary shall immediately notify the State Secretary-Treasurer of the election of new officers, changes of address or dates of meeting, or other information of a like nature.

"Section 7. If objection be raised to an applicant for membership in a Local, a two-thirds vote of the Local meeting shall be necessary to his admission. The objection and the vote upon his admission shall be entered upon the minutes of the meeting. The vote shall be taken by secret ballot. If rejected, the application shall not again be considered for a period of six (6) months from the date of his rejection, except by a two-thirds vote by secret ballot of the Local meeting. If the application is rejected, the Local Secretary shall at once notify the State Secretary-Treasurer of the rejection with reason for same and vote for and against; and the latter shall thereupon send a similar notification to all the Locals in the State.

"Section 8. Any member proven guilty of violating the Constitution, Program or Principles of this organization shall be suspended or expelled by the local of which he is a member. Accused shall have written charges preferred against them, specifying the provisions of the Constitution violated or the particular injury done the organization, and be furnished a copy of the same at least one week in advance of his trial. He shall be given a fair and prompt trial, of which a record shall be preserved by the Local. A two-thirds vote of the Local meeting, after the carrying out of the above procedure, shall be necessary for expulsion or for suspension for more than two months.

"Section 9. Locals may adopt such Constitutions and By-Laws as they deem necessary, provided they do not conflict with the State [fol. 228] and National Constitution.

"Section 10. Application for membership or transfer to a Local of a person formerly a member of an expelled Local, or at the time of application from a Local in suspension, or himself expelled from another Local or then in suspension, shall be referred to the State Executive Committee — disapproves such application, the applicant shall not be admitted. If such application be accepted by a Local in ignorance of the facts, upon application to the State Executive Committee it shall have the authority to require the Local to revoke its action.

"Section 11. The State Executive Committee shall have authority to revoke its action.

"Section 11½. The State Executive Committee shall have authority to revoke the Charter of any Local which maintains an average membership for six consecutive months of less than ten (10) members, based on the sale of due stamps for that period.

"Section 12. Members who are three (3) months in arrears in payment of their due shall cease to be members of the party in good standing. Members who are six (6) months in arrears shall be stricken from the membership rolls. The Local Secretary shall notify each member in writing of the delinquency in his payment of dues, at least two weeks before his name would be stricken off.

"Section 13. In every county where there are two (2) or more Locals, there shall be organized a County Central Committee to coordinate their activities and unify the movement. The committee shall carry on such activities as the Locals may desire and shall meet at least once a month.

"Article IX

"Referenda

"Section 1. Motions to amend or add to this constitution, or any other motion or resolution to be voted upon by the entire membership, shall be submitted by the State Secretary-Treasurer to the referendum of the party membership upon written request of not less than one-fourth of the Locals of the State.

"Section 2. Each proposition submitted by a Local for referendum [fol. 229] shall be published in the official organ of the party in the first issue following date submitted and remain open for sixty (60) days therefrom for seconds. If it shall not then have received the requisite number of seconds it shall be abandoned.

"Section 3. Where the proposed matter involves a change in the constitution, both the present and the proposed sections shall be printed upon the ballot. The proponents and the opponents of the proposition shall have the right to a statement of their position not to exceed 350 words which shall be printed upon one side of the ballot; if possible, the same side upon which the proposition is printed. Propositions for referendum shall be stated as concisely as possible and contain no argumentative matter.

"Section 4. Any motion once voted upon shall not be submitted to referendum again within one (1) year of its previous submission unless a majority of the Locals request such re-submission, or as an act of the State convention.

"Section 5. When the above provisions relating to a referendum are fulfilled, the State Secretary shall within four days thereof place the ballots properly made out in the hands of the Local secretaries. These in turn shall place such ballots in the hands of each of their members within a week of their receipt. Members may be

"urged to attend the Local meetings for the discussion of the issue, but no member shall be denied the right to cast his ballot by mail. Ballots by mail must be received by the Local secretary at least two (2) days before the required tabulation of the Local votes. Ballots sent by mail shall be directed to the Local Secretary who shall pin the envelope in which it was mailed to the ballot for verification. Three (3) weeks shall be allowed for the vote in the Locals to be dated from the day on which the ballots are received by the Local secretary. The tabulation of the Local votes must be read by the State office not later than thirty (30) days from the date on which the ballots were sent to the Local secretaries. The ballots shall be sent out to the Locals by registered mail, with return receipt demanded. Such receipts shall be filed in the State office with the records of the referendum. The returns from the Locals shall be tabulated by the State Executive Committee, and published in the [fol. 230] "official press, not later than two (2) weeks from the ending of the referendum. If the tabulation so announced shows that the referendum has carried, it shall be effective at once. These returns shall be kept after their tabulation for one year in the State office.

"Section 5. On and after April 1, 1920, no member shall be allowed to vote for any party official, nominee for political office, or on any referendum, unless he has been a member in continuous good standing for three (3) months, except in the case of members of Locals organized within that period. Each member shall sign his ballot with his name and address and date on which his vote is cast. Each ballot shall contain a space in which the secretary of the Local shall certify that the member is in good standing.

"Section 6. The results shall be tabulated by the Local secretary, in conjunction with an elected committee of three (3) other members, of whom at least one shall have voted against the proposal. (Waived in case of no opposition.) The tabulated vote shall then be entered upon one of the referendum ballots, and certified on the ballot with the following form signed by the members of the committee:

"(We, the undersigned members of the committee elected by Local ——— certify that the vote of Local ——— on this referendum is as hereon stated correctly tabulated. Signed ——— ——— (members of the committee). Seal."

"A duplicate shall be similarly prepared and signed which shall be enclosed with the ballots and the package sealed in the presence of the committee and held by the Local Secretary for 60 days, subject to the demand for their production by the State Executive Committee in case a contest is instituted. The secretary of the Local shall at once mail the original tabulated ballot in a registered letter, with return receipt demanded, to the State Secretary-Treasurer.

"Section 7. The term 'Local' as used in this Article shall be construed to mean a Local or Branch of a Local, but not a body composed of delegates from Branches or Locals.

"Article X

"Dues

"Section 1. The State Secretary-Treasurer shall furnish the Secretaries of the Locals with due stamps at the rate of thirty-five (35¢) cents each (dual stamps at the same rate); initiation and charter stamps at the rate of fifty (50¢) cents each. Members-at-Large shall be required to pay fifty (50¢) cents for each dues stamp, and One (\$1) Dollar for each initiation stamp.

"Section 2. The income from initiation and charter stamps shall be set aside as an organization fund. In places where a permanent organizer is employed giving all or most of his time to the Party work, this income shall go to his support. Such organizers shall make a monthly report of their income from this source to the State Secretary-Treasurer.

"Article XI

"Qualifications of Officials and Their Recall

"Section 1. On and after April 1, 1920, no member may be a candidate for any state office or state committee position in the party, or for delegate to Annual State Conventions or National Conventions, or for any political office, unless he has been a member of the party in continuous good standing for at least three months. Beginning with January 1, 1921, this requirement shall be extended to six (6) months in continuous good standing.

"Section 2. All officials of the party shall be subject to recall by the referendum of the membership.

"Article XII

"Labor Committee

"Section 1. In accordance with the Labor program adopted by the Organization convention of the Communist Labor Party, each Local shall elect a Local Labor Committee composed so far as possible of members of labor organizations whose functions shall be those outlined under the Special Report on Labor Organization adopted at the National Convention. The Local Labor Committees of an industrial district shall elect delegates to a common delegate body for the entire district, to be known as the District Labor Committee. It [fol. 232] shall be the function of this body to coordinate and unify the Industrial and Communist propaganda of the party. The District Labor Committee may for a similar purpose elect a delegate body for a State Labor Committee. Such Committees shall operate within the provisions of this constitution.

"Article XIII

"Young People's Communist Labor Leagues

"Section 1. In accordance with the provisions of the National Constitution each Local shall make a special effort to build up a Young People's Communist Labor League.

"Section 2. When two (2) or more Young People's Communist Labor Leagues are formed, they shall be encouraged to form district and state organizations to work in harmony with the party state office.

"Article XIV

"Section 1. This Constitution shall be in full effect upon its adoption by the State organization convention of November 9, 1919."

"PEOPLE'S EXHIBIT 5 TO REED'S TESTIMONY

"is as follows:

"Platform and Program Communist Labor Party

"Platform

"1.) The Communist Labor Party of the United States of America declares itself in full harmony with the revolutionary working class parties of all countries and stands by the principles stated by the Third International formed at Moscow.

"2.) With them it thoroughly appreciates the complete development of capitalism into its present form of Capitalist Imperialism with its dictatorship of the capitalist class and its absolute suppression of the working class.

"3.) With them it also fully realizes the crying need for an immediate change in the social system; it realizes that the time for parleying and compromise has passed; and that now it is only the question whether all power remains in the hands of the capitalist or is taken by the working class.

"4.) The Communist Labor Party proposes the organization of the workers as a class, the overthrow of capitalist rule and the conquest of political power by the workers. The workers organized as the ruling class, shall, through their government make and enforce the laws; they shall own and control land, factories, mills, mines, transportation systems and financial institutions. All power to the workers!

"5. The Communist Labor Party has as its ultimate aim: The abolition of the present system of production, in which the working class is mercilessly exploited, and the creation of an industrial

"republic wherein the machinery of production shall be socialized so
 "as to guarantee to the workers the full social value of the produce
 "of their toil.

"6. To this end we ask the workers to unite with the Communist
 "Labor Party for the conquest of political power to establish a gov-
 "ernment adapted to the communistic transformation.

"Party and Labor Program

"Part I

"The Communist Labor Party of America declares itself in com-
 "plete accord with the principles of Communism, as laid down in
 "the Manifesto of the Third International formed at Moscow.

"In essence, these principles are as follows:

"1. The present is the period of the dissolution and collapse of
 "the whole system of world capitalism. Unless capitalism is re-
 "placed by the rule of the working class, world civilization will col-
 "lapse.

"2. The working class must organize and train itself for the cap-
 "ture of state power. This capture means the establishment of the
 "new working class government machinery, in place of the state
 "machinery of the capitalists.

"3. This new working class government—the Dictatorship—will
 "reorganize society on the basis of Communism, and accomplish the
 "transition from Capitalism to the Communist Commonwealth.

"Communist society is not like the present fraudulent capitalist
 "democracy—which, with all its pretensions to equality, is merely
 "a disguise for the rule of the financial oligarchy—but it is a pre-
 "[fol. 234] letarian democracy, based on the control of industry and
 "the state by the workers, who are thereby free to work out their
 "own destiny. It does not mean capitalist institutions of govern-
 "ment which are controlled by the great financial and industrial in-
 "terests, but organs of administration created and controlled by the
 "masses themselves such as, for example, the Soviets of Russia.

"4. The Dictatorship of the Proletariat shall transfer private prop-
 "erty in the means of production and distribution to the working
 "class government, to be administered by the workers themselves.
 "It shall nationalize the great trusts and financial institutions. It
 "shall abolish capitalist agricultural production.

"5. The present world situation demands that the revolutionary
 "working class movements of all countries shall closely unite.

"6. The most important means of capturing state power for the
 "workers is the action of the masses, proceeding from the place
 "where the workers are gathered together—in the shops and fac-

"ories. The use of the political machinery of the capitalist state for this purpose is only secondary.

"7. In those countries in which there is a possibility for the workers to use this machinery in the class struggle, they have, in the past, made effective use of it as a means of propaganda, and of defense. In all countries where the conditions for a working-class revolution are not ripe, the same process must go on.

"8. We must rally all groups and proletarian organizations which have manifested and developed tendencies leading in the direction above indicated, and support and encourage the working class in every phase of its struggle against capitalism.

"Part II

"1. The economic conditions in every country determine the form of organization and method of propaganda to be adopted. In order efficiently to organize our movement here, we must clearly understand the political and economic structure of the United States.

"2. Although the United States is called a political democracy, there is no opportunity whatever for the working class through the regular political machinery to effectively oppose the will of the [fol. 235] "capitalist class.

"3. The years of Socialist activity on the political field have brought no increase of power to the workers. Even the million votes piled up by the Socialist Party without any proportionate representation. The Supreme Court, which is the only body in any Government in the world with the power to review legislation passed by the popular representative assembly, would be able to obstruct the will of the working class even if Congress registered it, which it does not. The Constitution, framed by the capitalist class for the benefit of the capitalist class, cannot be amended in the workers' interest, no matter how large a majority may desire it.

"4. Although all the laws and institutions of Government are framed and administered by the capitalists in their own interest, the capitalists themselves refuse to be bound by these laws or submit to these institutions whenever they conflict with their interests. The invasion of Russia, the raids into Mexico, the suppression of governments in Central America, and the Carribean, the innumerable wars against working class revolutions now being carried on—all these actions have been undertaken by the Administration without asking the consent even of Congress. The appointment by the President of a Council of National Defense, the War Labor Board, and other "extra-constitutional governing bodies without the consent of Congress, is a direct violation of the fundamental law of republican government. The licensing by the Department of Justice of anti-labor strike-breaking groups of employers—such as the National Security League, the American Defense Society, the Knights of Liberty, the American Protective League—whose ex-

"press purpose was the crushing of labor organizations and all class activities of the workers, and who inaugurated in this country a reign of terror similar to that of the Black Hundreds in Russia—was entirely opposed to the principles of the American Government."

"Moreover, the War and its aftermath have demonstrated that governing power does not reside in the regularly-elected, or even the appointed officials and legislative bodies. In every State, county and city in the Union, the so-called 'police power' is shown [fol. 236] to be superior to every law. In Minnesota, Wisconsin, and many other states, so-called 'police power' is shown to be superior to every law. In Minnesota, Wisconsin, and many other states, so-called Public Safety Commissions and similar organizations were constituted by authority of the Governors, made up of representatives of Chambers of Commerce and Employers' Associations, which usurped the powers of Legislatures and municipal administrations."

"6. Not one of the great teachers of scientific Socialism has ever said that it is possible to achieve the Social Revolution by the ballot."

"7. However, we do not ignore the value of voting, or of electing candidates to public office—so long as these are of assistance to the workers in their economic struggle. Political campaigns, and the election of public officials, provide opportunities for showing up capitalist democracy, educating the workers to a realization of their class position, and of demonstrating the necessity for the overthrow of the capitalist system. But it must be clearly emphasized that the chance of winning even advanced reforms of the present capitalist system at the polls is extremely remote; and even if it were possible, these reforms would not weaken the capitalist system."

"Part 3

"1. In America, the capitalist class has never had a feudal aristocracy to combat, but has always been free to concentrate its power against the working class. This has resulted in the development of the American capitalist class wholly out of proportion to the corresponding development in other countries. By their absolute control of the agencies of publicity and education, the capitalists have gained a control over the political machinery which is impossible to break by resorting to this."

"2. Moreover in America, there is a highly-developed Labor movement. This makes it impossible to accomplish the overthrow of capitalism except through the agency of the organized workers."

"Furthermore, there is in America a centralized economic organization [fol. 237] of the capitalist class which is a unit in its battle with the working class, and which can be opposed only by a centralized economic organization of the workers."

"3. The economic conditions of society, as Marx foretold, are pushing the workers toward forms of organization which are, by the very nature of things, forced into activity on the industrial field with a political aim to the overthrow of capitalism.

"5. It is our duty as Communists to help this process, to hasten it, by supporting all efforts of the workers to create a centralized revolutionary industrial organization. It is our duty as Communists who understand the class struggle, to point out to the workers that upon the workers alone depends their own emancipation and that it is impossible to accomplish this through capitalist political machinery, but only by the exercise of their united economic power.

"Program

"1. We favor international alliance of the Communist Labor Party only with the Communist groups of other countries, those which have affiliated with the Communist International.

"2. We are opposed to association with other groups not committed to the revolutionary class struggle.

"3. We maintain that the class struggle is essentially a political struggle, that is, a struggle by the proletariat to conquer the capitalist state, whether its form be monarchical or democratic-republicanism, and to replace it by a government structure adapted to the Communist transformation.

"4. Communist platforms, being based on the class struggle, and recognizing that this is the historical period of the Social Revolution, can contain only one demand: The establishment of the Dictatorship of the Proletariat.

"5. We favor organized party activity and cooperation with class conscious propaganda and action. Locals and Branches shall organize shop branches, to conduct the Communist propaganda and organization in the shops and to encourage the workers to organize in One Big Union.

[fol. 238] "6. The Party shall propagandize industrial unionism and industrial union organization, pointing out their revolutionary nature and possibilities.

"7. The Party shall make the great industrial battles its major campaigns, to show the value of the strike as a political weapon.

"8. The Party shall maintain strict control over all members elected to public office—not only the local organizations, but the National Executive Committee. All public officials who refuse to accept the decisions of the Party shall be immediately expelled.

"9. In order that the Party shall be a centralized organization, capable of united action, no autonomous groups or federations independent of the will of the entire Party, shall be permitted.

"10. All Party papers and publications endorsed by the Party
 "and all educational and propaganda institutions endorsed by the
 "Party, shall be owned and controlled by the regular Party organiza-
 "tion.

"11. Party platforms, propaganda, dues and methods of organiza-
 "tion shall be standardized.

"Special Report on Labor Organization

"The purpose of the Party is to create a unified revolutionary
 "working class movement in America.

"The European War has speeded up social and industrial evolution
 "to such a degree that capitalism throughout the world can no longer
 "contain within itself the vast forces it has created. The end of the
 "capitalist system is in sight. In Europe it is already tottering
 "and crashing down, and the proletarian revolutions there show that
 "the workers are at the same time becoming conscious of their power.
 "The capitalists themselves admit that the collapse of European cap-
 "italism and the rise of the revolutionary working class abroad can-
 "not help but drag American capitalism into the all-embracing ruin.

"In this crisis the American working class is faced with an al-
 "ternative: Either the workers will be unprepared, in which case
 "they will be reduced to abject slavery; or they will be sufficiently
 "conscious and sufficiently organized to save society by reconstruct-
 "ing it in accordance with the principles of Communism.

[fol. 239]

"11

"1. By the term 'revolutionary industrial unions' is meant the
 "organization of the workers into unions by industries with a revolu-
 "tionary aim and purpose; that is to say, a purpose not merely to de-
 "fend or strengthen the status of the workers as wage earners, but
 "to gain control of industry.

"2. In any mention of revolutionary industrial unionism in this
 "country, there must be recognized of the immense effect upon the
 "American labor movement of the propaganda and example of the
 "Industrial Workers of the World, whose long and valiant struggles
 "and heroic sacrifices in the class-war have earned the respect and
 "affection of all workers everywhere. We greet the revolutionary
 "industrial proletariat of America, and pledge them our wholehearted
 "support and cooperation in their struggles against the capitalist
 "class. Elsewhere in the organized Labor movement a new tendency
 "has recently manifested itself, as illustrated by the Seattle and
 "Winnipeg strikes, the One Big Union and Shop Committee move-
 "ments in Canada and the West, and the numerous strikes all over
 "the country of the rank and file, which are proceeding without the
 "authority of the old re-actionary Trade Union officials, and even
 "against their orders. This tendency, an impulse of the workers
 "toward unity for common action across the lines of craft-divisions,
 "if carried to its logical conclusion, would inevitably lead to workers
 "control of industry.

"3. The revolt of the rank and file must not be allowed to end in the disorganization of the ranks of organized labor. We must help to keep the workers together, and through rank and file control of the Unions, assist the process of uniting all workers in One Big Union.

"4. With this purpose in view, the Communist Labor Party welcomes and supports, in whatever labor organization found, any tendency toward revolutionary industrial unionism. We urge all our members to join industrial unions. Where the job-control of the reactionary craft-unions compels them to become members of these [fol. 240] craft-unions, they shall also join an industrial organization, if one exists. In districts where there are no industrial unions, our members shall take steps to organize one.

"III

"1. To Labor and Labor alone is industry responsible. Without the power of Labor, industry could not function. The need of the hour is that Labor recognize the necessity of organization and education. This cannot be achieved by attempting to influence the leaders of the Labor movement, as has been clearly shown by the actions of the recent Convention of the American Federation of Labor. It can only be done by getting the workers on the job to come together and discuss the vital problems of industry.

"3. Because of the industrial crisis created by the World War, together with the break-down of industry following the cessation of hostilities, and the interruption of the processes of exchange and distribution, there is great dissatisfaction among the workers. But they can find no means of dealing with the situation. Their leaders have refused to take any steps to meet the grave problems of today and moreover, they obstruct all efforts of the rank and file to find some way by which the workers can act.

"4. We suggest that some plan of labor organization be inaugurated along the lines of the Shop Steward and Shop Committee movements. These Committees can serve as a spur or check upon the officials of the Unions; they will necessarily reflect the spirit and wishes of the rank and file, and will educate the workers on the job in preparation for the taking over of industry.

"Recommendations

"We recommend the following measures:

"1. That all Locals shall elect Committees on Labor Organization, composed so far as is possible of members of Labor Unions, whose functions shall be:

"a) To initiate, or support, the creation of Shop Committees in every industry in their district, the uniting of these Committees, in Industrial Councils, District Councils, and the Central Council of all Industries.

[fol. 241] "b) To propagandize and assist in the combining of "craft Unions, by industries, in One Big Union.

"c) To bring together in the centers of Party activity—Locals "and Branches—delegates from factories and shops to discuss tac- "tics and policies of conducting the class struggle.

"f) To mobilize all members who can serve as organizers to fill "the demand for men and women who can organize bodies of workers "along the lines indicated above.

"g) To direct the activities of local Party organizations in as- "sisting the workers whole-heartedly in their industrial battles, "and making use of these battles as opportunities for educating the "workers.

"2. That a National Committee on Labor Organization be elected "by this Convention, which shall co-operate with the local Com- "mittees above mentioned. In addition, the National Committee "shall be charged with the task of mobilizing national support for "strikes of national importance, and shall endeavor to give these a "political character.

"a) It shall collect information concerning the revolutionary "Labor movement from the different sections of the country, and "from other countries, and through a Press Service to Labor and "Socialist papers, shall spread this information to all parts of the "country.

"b) It shall mobilize on a national scale all members who can "serve as propagandists and organizers, who can not only teach, but "actually help to put into practice the principles of revolutionary "industrial unionism and Communism.

"Constitution

"Article I

"Name

"The name of this organization shall be the Communist Labor "Party of the United States of America.

"Article II

"Membership

"Section 1. Any person, eighteen years of age or over, who has "severed his connection with all other political parties and political [fol. 242] "organizations, and who subscribes to the principles of "the Communist Labor Party, shall be eligible to membership in "the party.

"Section 2. No member of the party shall accept or hold any "appointive public office, honorary or remunerative (Civil Service "positions excepted), without the consent of his state organization; "nor be a candidate for public office without the consent of his city, "county, or state organization, according to the nature of the office.

"Section 3. A member who desires to transfer his membership from the party in one state to the party in another state may do so upon the presentation of his card showing him to be in good standing at the time of asking for such transfer, and also a transfer card duly signed by the secretary of the local from which he transfers.

"Section 4. All persons joining the Communist Labor Party shall sign the following pledge:

"Application for Membership in the Communist Labor Party

"I, the undersigned, recognizing the class struggle between the capitalist class and the working class, and the necessity of the working class organizing itself politically and industrially for the establishment of Communism, do hereby apply for membership in the Communist Labor Party.

"I have no relation, as member or supporter, with any other political party.

"I am opposed to all political organizations that support the present capitalist profit system and am opposed to any form of trading or fusing with any such organizations.

"In all my political actions while a member of the Communist Labor Party, I agree to be guided by the constitution and platform of that party."

"Article III

"National Executive Committee

"Section 1. The policies of the Communist Labor Party shall be carried out by the National Executive Committee.

"Section 2. The National Executive Committee shall consist of five members who shall be elected by the Annual National Conventions of the Party to serve for a term of one year. At the time [fol. 243] "when the National Executive Committee is elected, the Convention shall also elect a first and a second alternate to the committee.

"Section 3. Members of the National Executive Committee and alternates thereto shall be elected by majority vote of the Convention.

"Section 4. The traveling expenses of members of the National Executive Committee in attending meetings of the Committee and a per diem not exceeding six dollars for the time of attending committee meetings shall be allowed out of the national funds.

"Article IV

"Duties of the N. E. C.

"Section 1. The duties and powers of the National Executive Committee shall be:

"(a) To represent the party in all National and International affairs, subject in the latter case to the provisions for International Delegates and Secretary.

"(b) To call National Conventions and special conventions decided upon by the referendum of the party. In case of emergency, the National Executive Committee may call special conventions by a four-fifths vote of the Committee.

"(c) To formulate the rules and the order of business of the National Conventions of the party not otherwise provided for by this constitution, and subject to amendment and adoption by the conventions.

"Section 2. The National Executive Committee, as required by the Federal Corrupt Practices Act, shall elect a permanent chairman who shall serve without salary.

"Section 3. The Committee shall formulate its own rules of procedure, not inconsistent with the provisions of this constitution.

"Section 4. Members of the National Executive Committee shall be subject to recall by the membership of the party through the referendum.

"Section 5. The location of the National headquarters shall be determined by the National Executive Committee.

"Section 6. (a) No funds of the National Organization shall be [fol. 244] appropriated for any purpose not directly connected with the propaganda of the Communist Labor Party or the struggles of labor. No more than \$100 shall be appropriated to any one organization other than a sub-division of the party; and no application for financial assistance coming from locals or other subdivisions of state organizations shall be entertained unless they have the endorsement of their state organization.

"(b) The committee shall not have power to appropriate funds, except for the current expenses of the National office, unless the party has sufficient funds on hand to meet all outstanding obligations, or unless the regular income will in the natural course of events cover such appropriations before the end of the current year. The committee shall make no appropriations directly or indirectly, for the support of any paper or periodical not owned by the National Office, or by a subdivision of the party.

"Section 7. The National Office mailing list of locals and branches and of subscribers shall not be given to any one outside the membership, nor shall they be given to members for private purposes. Appropriate portions of them may be given to members and party officials at any time for purposes of organization, propaganda and renewals of subscriptions.

"Article V

"National Executive Secretary

"Section 1. The National Executive Secretary shall be employed by the National Executive Committee. He may be removed at any time by the committee or by referendum vote of the party membership. He shall give bonds in the amount fixed by the committee. His compensation shall be fixed by the National Executive Committee.

"Section 2. The National Executive Secretary shall have charge of all affairs of the National Office, including the establishment of necessary departments, subject to the directions of the National Executive Committee. He shall supervise the accounts of the National Office and its departments.

"Section 3. The National Executive Secretary shall publish a weekly official organ of the party in which shall appear all important official reports and announcements a monthly report of the financial affairs of the party; a summary of the conditions and the membership in the states and territorial organizations; the principal business transacted by the national officials and such other matters pertaining to the organization of the party as may be of general interest to its membership.

"Section 4. The National Executive Secretary shall:

"(a) Make reports of the membership and condition of the party organization and recommendations thereon, to the National Conventions.

"(b) Receive dues and reports from the state organizations.

"(c) Conduct the national referendum in the manner provided for in this Constitution.

"(d) Print in the official organ a specific statement of all moneys expended for printing leaflets and books, with titles and authors of the same.

"Article VI

"Representatives in Congress

"Section 1. Members of Congress elected on the Communist Labor Party ticket shall submit reports of their actions in Congress to the National Conventions and to the National Executive Committee, as the latter may require.

"Section 2. In the support of measures proposed by the Communist Labor Party, they shall carry out instructions which may be given by the National Conventions, the National Executive Committee, or by a general referendum of the party.

"Section 3. In all legislative bodies as Congress, State Legislatures, Boards of Supervisors or Town Councils, Communist Labor Party members shall organize into a group separate and apart

“from all other parties. They shall elect a chairman and in the
 “support of all measures definitely declared for in the platforms
 “of the party, they shall vote as a unit.

“Article VII

“National Conventions

“Section 1. A regular National Convention of the party shall be
 “held annually on the tenth of May at such place as the National
 [fol. 246] “Executive Committee may decide.

“Section 2. Special conventions of the party may be held at any
 “time if decided upon by a referendum of the membership of a four-
 “fifths vote of the National Executive Committee.

“Section 3. The National Convention shall be composed of one
 “hundred delegates to be apportioned among the states in the fol-
 “lowing manner:

“One from each organized state and territory, and the remainder
 “in proportion to the average national dues paid by the organiza-
 “tion of such states and territories during the preceding year. No
 “delegate shall be eligible unless he is a resident member of the State
 “from which his credential is presented.

“Section 4. Railroad fare, including tourist sleeper car fare and
 “berth, of delegates to and from the National Conventions, and a
 “per diem allowance of \$3.50 to cover expenses, shall be paid from
 “the national treasury by setting aside a portion of the national
 “dues sufficient to cover the same, to be estimated at the beginning
 “of each year.

“Section 5. (a) The election of delegates to the National Con-
 “vention shall be completed not later than sixty days preceding the
 “convention, and the state secretaries shall furnish the National
 “Executive Secretary with a list of the accredited delegates imme-
 “diately after said election.

“(b) The National Executive Secretary shall prepare a printed
 “roster of all delegates, including the contested delegates who shall
 “be so indicated. This roster shall be sent to each delegate and for-
 “warded to the party press for publication before the date of meet-
 “ing. Such roster shall contain the occupation of each delegate at
 “the time of his nomination and his office or employment in the
 “party. All official reports required to be presented to the National
 “Convention shall be printed and sent to each delegate elected and
 “furnished to the party press at least fifteen days before the date of
 “the convention.

“(c) At the time and place set for the opening of the National
 [fol. 247] “Convention, the National Executive Secretary shall call
 “the convention to order, and shall call the roll of all delegates in-
 “cluding the contested delegates. The uncontested delegates shall
 “then permanently organize the convention.

"(d) No delegation's seats may be contested unless the contesting delegation is present at the convention.

"Section 6. The National Convention shall have the power to nominate candidates for President and Vice-President, to adopt a National platform and to transact such other business as the Convention may see fit. Vacancies on the national ticket shall be filled by the National Executive Committee.

"Section 7. All national platforms, amendments of platforms, and resolutions adopted by any National Convention shall be submitted seriatim to a referendum vote of the membership. One-fourth of the regularly elected delegates shall be entitled to have alternative paragraphs to be submitted at the same time. Such alternative paragraphs, signed by one-fourth of such delegates, shall be filed with the Executive Secretary not later than one day after the adjournment of the convention.

"Article VIII

"State Organizations

"Section 1. The formation of all state or territorial organizations or the organization of the state or territorial organizations which may have lapsed shall be under the direction of the National Executive Secretary.

"Section 2. No state or territory may be organized unless it has an aggregate membership of not less than three hundred. When the membership of any state averages less than three hundred per month for any six consecutive months the National Committee may revoke the charter of that state.

"Section 3. (a) The platform of the Communist Labor Party shall be the supreme declaration of the party, and all state and municipal platforms shall conform thereto. No state or local organization shall under any circumstances fuse, combine or compromise with any other political party or organization, or refrain [fol. 248] "from making nominations, in order to favor the candidate of such other organizations, nor shall any candidate of the Communist Labor Party accept any nomination or endorsement from any other party or political organization.

"Section 4. No member of the Communist Labor Party shall, under any circumstances, vote in any political election for any candidate other than party members nominated, endorsed or recommended as candidates by the Party, or advocate voting for them. To do so will constitute party treason and result in expulsion from the party.

"Section 5. (a) The State Secretaries shall make monthly reports to the Executive Secretary concerning their membership, financial condition and general standing of the party.

"(b) During the months of January and July of each year, or at any other time required by the National Executive Committee or by this constitution, the state secretaries shall furnish the National Executive Secretary a list of all locals affiliated with their respective state organizations, together with the number of members in good standing, and the name and of the corresponding secretary of each local. Refusal, failure or neglect to comply with this section shall subject the state organization to suspension from the Communist Labor Party and deprive such state organization of participation in the affairs of the Communist Labor Party, and shall be a forfeiture of the right to representation in the National Executive Committee, the conventions and congresses of the party.

"Section 6. (a) All applicants for membership in the Communist Labor Party upon signing the party pledge as required in Article 2, Section 4, of this constitution, shall pay an initiation fee of One Dollar, twenty-five cents of which shall be sent to the National office.

"(b) All members shall pay uniform dues of fifty cents per month, twenty cents of which shall be sent to the National office.

"Section 7. (a) The National Office shall also issue to the state secretaries exempt stamps, both regular and special, free of charge, to be used by party members temporarily unable to pay dues on account of employment caused by sickness, strikes, lockouts or [fol. 249] any other conditions not within their control.

"(b) Any member desiring to use such exempt stamps shall make application therefor to the financial secretary of his local organization, and such application shall be passed upon by such organization. Exempt stamps shall be issued only to members in good standing who have paid dues for at least three months. The number of exempt stamps shall not exceed 10 per cent of the total number of stamps obtained by the respective state organizations. The acceptance of exempt stamps by any members shall in no way disqualify such member from any rights and privileges of party membership.

"(c) The National Office shall also issue a double perforated stamp to the state secretary at the rate of twenty cents per stamp, one-half of such stamp to be affixed to membership card of husband and other half to that of wife. Husbands and wives desiring to use such stamp shall make application to the financial secretary of their local and such application shall be passed upon by such organization.

"Section 8. All state organizations shall provide in their constitutions for the initiative, referendum and recall.

"Section 9. No person shall be nominated or endorsed by any subdivision of the party for candidate for public office unless he is a member of the party and has been such for at least two years, except with the consent of the state organization. But this provi-

"sion shall not apply to organizations which have been in existence for less than two years.

"Section 10. When a controversy exists in a state organization, the Executive Secretary shall continue to sell due stamps to the Secretary recognized by him before such controversy is officially brought before him until a state referendum has decided otherwise. He shall take no action except on petition of ten per cent of the "locals (but not less than three locals), which must be located in different localities, appearing on the last official list filed with him by the State Secretary at least three months prior to the controversy, and then only if there is doubt as to who is State Secretary. In such case he shall hold a referendum of those locals [fol. 250] "reported on the last official list to determine who is State Secretary. The individually signed ballots in such referendum shall be sent to the Executive Secretary.

"Article IX

"International Delegates and International Secretary

"Section 1. Delegates to the International Congress and International Secretary shall be elected at the time and in the manner provided for in the election of members of the National Executive Committee. There shall be one delegate for every twenty thousand members, ascertained by computing the average for the preceding year. The requisite number of candidates receiving the highest number of votes shall be elected. The next highest in the election shall be the alternates. The expenses of the delegates and a per diem equal to the per diem fixed for members of the National Executive Committee shall be paid out of the national treasury.

"International delegates and International Secretary shall be subject to recall by referendum of the party membership.

"Article X

"Foreign-speaking Federations

"Section 1. Five branches of the Communist Labor Party working in any other language than English shall have the right to form a Language Federation under the supervision of the National Executive Secretary.

"Section 2. Such Language Federation shall have the right to elect an officer known as Translator-Secretary, who shall be conversant with his own language as well as the English language, and whose duty it shall be to serve as a medium of communication between his federation and the National Organization of the Communist Labor Party.

"Section 3. When such Language Federation shall have at least 1,000 members, their Translator-Secretary shall be entitled to nec-

"essary office room in the National Office. When any Language Federation to office room may be suspended at the discretion of the National Executive Committee.

[fol. 251] "Section 4. Each foreign Language Branch shall purchase its due stamps from the City or County committee where such organizations exist, or otherwise from the state secretary. Such purchases of due stamps shall be receipted for upon a special form provided for that purpose by the National office. These receipts shall then be sent to the respective Translator-Secretaries, who, upon presentation of the same to the National Executive Secretary, shall receive from him the sum of fifteen cents for each stamp thus receipted.

"Section 5. (a) Branches of Language Federations shall be integral parts of the county or state organizations, and must in all cases work in harmony with the constitution and platform of the State and County organizations of the Communist Labor Party.

"Language branches, not affiliated with a federation of their respective language, shall work in harmony with such federation, restricting their work within the territorial jurisdiction of such branches. In no case, however, shall such branches indulge in or permit their members to carry on work against the interests of the Federation. Federations shall not be permitted to organize additional branches within the territorial jurisdiction of branches not affiliated with them, except with the consent of the state organization. The charter of any language branch not affiliated with a federation shall be revoked by the state organization in accordance with the method of procedure provided by the constitution of the state organization. When the charter of such branch is revoked, such of its members who will agree to refrain from similar objectionable work in the future shall be organized in a new branch. But no member of a branch the charter of which has been revoked for the offense mentioned above, shall be denied admission to the new branch, if a statement is signed obligating himself to work in harmony with the provisions of this section.

"(b) A Language Federation may, if its constitution so provides, exclude for cause any of the branches or locals affiliated with it. Such excluded locals and language branches shall lose only the rights and privileges dependent upon affiliation with the federation. [fol. 252] "They shall continue to be an integral part of the County and State organizations, until such time as the exclusion has been approved by the County and State organizations.

"Members of a federation cannot be suspended or expelled from the party by the federation or by any of its subdivisions, the power to suspend or expel members from the party being vested exclusively in the county and state organizations. The accused members shall be accorded a fair trial in the manner provided by the county and state constitutions or local by-laws.

"Section 6. All propaganda work of the language federations shall be carried out under the supervision of their executive officers ac-

"According to the by-laws of the federations. Such by-laws must be in conformity with the constitution of the Communist Labor Party.

"Section 7. Each Translator-Secretary shall make every three months a report of the general standing and condition of his federation to the National Office.

"Section 8. The Communist Labor Party shall not recognize more than one federation of the same language.

"Section 9. Each federation shall be entitled to elect one fraternal delegate to the National Conventions of the party; provided, that such delegate shall have a voice, but no vote. He shall receive railroad fare and per diem from the party the same as regular delegates.

"Article X

"Referendum

"Section 1. Motions or resolutions to be voted upon by the entire membership of the party, except proposed amendments to the National Constitution, shall be submitted by the Executive Secretary to the referendum vote of the party membership upon the request of locals representing at least five per cent of the entire membership on the basis of dues paid in the preceding year.

"The term 'local' as herein used shall be construed to mean a local or branch of a local, but not a body composed of delegates from branches or locals.

[fol. 253] "Section 2. Each motion and resolution shall be printed in the Official paper and remain open ninety days from the date of first publication, and if it has not then received the requisite number of seconds, it shall be abandoned. The vote on each referendum shall close sixty days after its submission.

"Section 3. Referendums shall be submitted without preamble or comment. But comment not to exceed two hundred words both for and against may accompany the motion when printed.

"Section 4. Any officer who attempts to interfere with the processes of the membership shall be expelled from office.

"Article XII

"Young People's Communist Labor League

"Section 1. The work of the Young People's Communist Labor League in the national field shall be under the control and direction of the Executive Committee of the Party.

"Section 2. Branches of the Young People's Communist Labor League shall be under the control of the city, county, or state organizations, and must in all cases work in harmony with the constitution and platform of the city, county or state organization of the Party.

"Section 3. The Young People's Communist Labor League shall
 "be entitled to elect one fraternal delegate, having a voice but no
 "vote, to the National Conventions. He shall receive railroad fare
 "and per diem from the party the same as regular delegates.

"Article XIII

"Amendments

"Section 1. This Constitution may be amended by a referendum
 "of the party membership, amendments may be proposed by the Na-
 "tional Convention, or upon the request of locals representing at least
 "eight per cent of the entire membership on the basis of dues paid
 "in the preceding year. All such amendments to be submitted
 "seriatim to a referendum vote of the party membership.

"The term 'local' as herein used shall be construed to mean a
 "local or branch of a local, but not a body composed of delegates
 "from branches or locals.

"Section 2. All amendments shall take effect sixty days after
 [fol. 254] "being approved by the membership.

"Article XIV

"Section 1. Any person, formerly a member of the Socialist Party
 "of the U. S. who at the time of the Emergency National Conven-
 "tion of the Socialist Party in 1919, was in good standing in that
 "organization and who has signed the regular application pledge for
 "the Communist Labor Party, shall be considered a member in good
 "standing of the Communist Labor Party and shall not be required
 "to pay the One Dollar initiation fee, provided such persons' ap-
 "plications for membership in the Communist Labor Party shall be
 "received before December 1, 1919.

"Section 2. This Constitution shall be in effect immediately upon
 "its adoption by the Convention at Chicago, at which the Communist
 "Labor Party was formed.

"Mr. Snook:

"Q. Do you know John C. Taylor, the State secretary?

"A. I do. He is not the State secretary.

"Q. What is he?

"A. The secretary of the Socialist Party.

"Q. And he was acting as secretary at this convention of the Com-
 "munist Labor Party of the State of California?

"A. Yes sir.

"Q. On November 9th?

"A. Yes.

"Q. Do you know his signature?

"A. No, I wouldn't swear to his signature.

"Q. Have you ever seen him write?

"A. I have seen some of his signatures, but I refuse to identify anything like that because I don't know.

"Q. You don't know his signature when you see it?

"A. Well, I don't know it, no.

"Q. Do you know the writing of William Serb?

"A. No sir.

"Q. Were you present at the meeting of Local Oakland on September 29th?

"A. Local what?

"Q. Local Oakland.

"A. Of the Socialist Party.

"Q. On September 29, 1919—I don't know.

"A. What did they do?

"Q. I have the minutes here signed by William Serb, Secretary pro tem.

"A. No, I wasn't there.

[fol. 255] "Q. You said a while ago that you were there every meeting night.

"A. Except when I couldn't be there, of course. I was there mostly all of the time because I was Secretary of the Socialist Party at that time.

"Mr. Snook: That is all.

"Mr. Pemberton:

"Q. Miss Whitney has not been present at any meetings of the Oakland Local since the organization at this State Convention, has she, to your knowledge?

"A. I don't think so, no.

"The Court:

"Q. Not those that you were present?

"A. No, she wasn't there. I didn't see her.

"Mr. Pemberton:

"Q. You had your name on this paper as organizer. Organizer of what?

"A. I was organizer of the temporary organization.

"Q. Of the Communist Labor Party?

"A. It was temporary. I wasn't the organizer. I was acting organizer until they could find somebody to fill the bill.

"Q. You are still acting organizer?

"A. Still acting organizer.

"Q. Still trying to organize the party?

"A. We haven't been organizing anything since the State Convention.

"Q. I believe you said you had not been arrested?

"A. No sir, I haven't been arrested.

"Q. Have you an agreement with the District Attorney's Office,

"that you should turn State's evidence in return for not being arrested?"

"A. I have never seen the District Attorney's office. I would never turn State's evidence.

"Q. You have appeared here as a witness.

"A. I appear here as a witness against my will.

"Q. Have you been holding regular meetings of that Local during the past month?"

A. No sir. We haven't held meetings since the raid by the Police Department.

"Q. That was shortly after the State convention, was it not?"

"A. Yes sir.

"Q. Then there never has been no report to your Local at all concerning the State convention, has there?"

"A. No, sir, there has not.

[fol. 256] "Q. Then the actions of the State convention have not been ratified by your Local?"

"A. They have not.

"Q. They are not binding upon your Local until they are ratified?"

"A. Of course not.

"Q. Then they are not binding upon you or Miss Whitney, or any member of your Local?"

"A. No sir.

"The Court:

"Q. Are you a member of the Communist Labor Party now?"

"A. I am a member only of the temporary organization.

"Q. Yes; you are acting organizer, are you not?"

"A. Of the temporary organization.

"Q. You are acting organizer, are you not?"

"A. Yes, that temporary organization.

"Q. Notwithstanding that there hasn't been a meeting of your Local and notwithstanding the fact that you have made no report, you still consider yourself a member of the party, you are acting organizer of it, is that right, Mr. Reed?"

"A. Not of the International Organization.

"Q. I didn't put the word 'International' in my question.

"A. Of what organization?"

"Q. Of the organization that was effected at Loring Hall in this City on the date mentioned.

"A. Yes sir.

"Mr. Pemberton:

"Q. But you never heard Miss Whitney say whether or not she considered herself a member of it, have you?"

"A. Why, she took out a card in the temporary organization.

"Q. Have you that card?"

"A. I sure haven't.

"Q. You never heard her say whether or not she intended to adhere to that organization?

"A. I haven't heard anybody say that.

"Q. You certainly haven't heard her.

"The Court:

"Q. Will you explain what you mean by saying that the defendant took out a temporary card?

"A. You had to take out a temporary card so you could attend the convention.

"Mr. Snook:

"Q. Is this the one?

"A. She didn't sign one of those. She had one of those.

"Q. Is this the one that you mean?

"A. Sure.

"Mr. Snook: I offer it in evidence.

[fol. 257] "Mr. Pemberton: What is the date of that?

"Mr. Snook: It is just a blank.

"The Court: It is not filled out.

"Q. Tell me how you filled it out.

"A. I put 'Oakland'—

"Q. The one you gave to the defendant?

"A. I wrote 'Oakland, State of California' under 'Anita Whitney'; address, '2121 Webster St.', I think. 'November, 1919,' and signed my own name as secretary, and '531 11th St.'

"Q. You issued that to her?

"A. Yes sir.

"Q. She took it from you?

"A. Yes sir.

"The Court: It may be marked People's Exhibit 6 in evidence."

Mr. Pemberton: Here is the original of People's Exhibit 6. Do you want it?

Mr. Harris: Yes, I will read that. (Reading:)

"PEOPLE'S EXHIBIT 6

"is as follows:

"Communist Labor Party Membership Card

"Sub-Division, ———; City, ———; State, ———.

"Name, ———; Address, ———; Admitted ———, 19——. No.

"Page —. ———, Sec'y.

"Address, ———. Issued by authority of Nat'l Executive Committee, 3207 Clark Ave., Cleveland, O.

"Pay dues ahead and You'll Never be behind. Year, 19——. Jan., Feb., Mar., Apr., Jan., Feb., Mar., Apr., May, June, July, Aug.,

"May, June, July, Aug., Sept., Oct., Nov., Dec., Sept., Oct., Nov.,
"Dec.

"Special Stamps, Charter Membership Stamp.

"International Labor Day Stamp.

"Organization assessment stamp.

"International Labor Day stamp.

"Issued by authority of Nat'l Executive Committee, 3207 Clark
"Ave., Cleveland, O.

"This Certifies that the owner of this card has paid dues for the
"months covered by due stamps, and is in good financial standing
"to and including last month stamped.

"Jan to July, ———, ——— ———, Fin. Sec'y.

"Address, ———.

"July to Dec., ———, ——— ———, " "

"Address, ———.

"Jan. to July, ———, ——— ———, " "

"Address, ———.

"July to Dec., ———, ——— ———, " "

"Address, ———.

"Mr. Pemberton:

"Q. That was before or after the State Convention?

"A. That was before the State Convention.

"Q. Have you seen her since the State Convention?

"A. Yes, a few times passing.

"Q. Just passing?

"A. Yes.

"Q. You have never seen her at any meeting of any committee or
"organization of the party?

"A. Not that I know of.

[fol. 258] "Mr. Pemberton: That is all.

"Mr. Snook:

"Q. What is that?

"A. That is a form, blank application card for membership in the
"Communist Labor Party.

"Mr. Snook: I offer that in evidence, if the Court please, as People's Exhibit 7.

"Mr. Pemberton: I object to it as not connected with this defendant.

"The Court: In what manner do you object as not connected with this defendant?

"Mr. Pemberton: The defendant is charged with organizing, assisting in organizing and knowingly become a member of a certain organization, society, group and assemblage of persons organized and assembled for the purpose of teaching, advocating, aiding and abetting criminal syndicalism, and in both constitutions the form is set forth as the proper form to be used by any person joining it. The writing on there says that the applicant has to subscribe.

"The Court: Is that in evidence.

"Mr. Snook: The Constitution is in evidence.

"Q. Where did you get this form?

"A. I got that from Mr. Taylor.

"Q. You got that from Mr. Taylor?

"A. Yes.

"Q. He was acting secretary of the Communist Labor Party of the State of California?

"A. I think he was, yes.

"The Court:

"Q. To be used for the purpose which you testified in acting as organizer?

"A. Yes.

"Mr. Snook:

"Q. You mean John C. Taylor?

"A. Yes sir.

"The Court: The objection is overruled. It may be marked People's Exhibit 7, and copied into the record.

"PEOPLE'S EXHIBIT 7

"is as follows:

"Application for Membership

"Communist Labor Party

"I, the undersigned, recognizing the class struggle between the capitalist class and the working class, and the necessity of the working class organizing itself politically and industrially for the purpose of establishing Communist Socialism, hereby apply for membership in the Communist Labor Party. I have no relations (as member or supporter) with any other political party. I am opposed to all political organizations that support the present capitalist profit system, and I am opposed to any form of trading or fusing with any such organizations. In all my actions while a member of the Communist Labor Party I agree to be guided by the Constitution and platform of that party."

"Name: _____. Occupation: _____.

"Street Address: _____. Initiation Fee: \$1.00.

"City: _____. State: _____. Dues at 50¢ month: _____.

"Age: _____. Date: _____, _____. Paper and Lit: _____.

"Give Name of Your Union. _____. Donations: _____.

"Proposed by _____ Total: _____.

"Where do You Work? Answer on Reverse Side.

“Official Receipt

“This certifies that ——— has made application for membership in the Communist Labor Party and has paid the Initiation Fee, \$1.00.

“Dues, at 50¢ per month: ———.

“Papers and Literature: ———.

“Donations: ———.

“Communist Labor Party. Total: ———.

“By ———.

“Notice to Applicant.—The sub-division of the Communist Labor Party which will consider your application meets

“Place: ———.

“Address: ———.

“Date: ———.

“Mr. Snook:

“Q. This membership card that you spoke of, People’s Exhibit 6, “where did you get that from?

“A. John C. Taylor.

“Q. The State, acting State Secretary of the Communist Labor Party of California?

“A. Yes sir.

“Q. Did Local Oakland pay the acting State Secretary for these “two cards and due stamps and other supplies?

“A. I think we paid for some due stamps.

“Q. Did you pay for these cards?

“A. No sir.

“Q. Do you still owe the State Organization for them then, is that “correct?

“A. Yes sir.

[fol. 260] “Mr. Snook: That is all.”

Mr. Harris: It is understood, of course, that we are introducing these in evidence, and you will stipulate that we may introduce them subject to your objection that you have heretofore made? In other words, you are not objecting to the method of procedure that we are introducing them in, by not having the Clerk of the court here present inasmuch as Mr. Reed is not present in court now?

Mr. Pemberton: We are not objecting upon the ground of lack of more identification. We know they were sufficiently identified. We are only saving our general objection, that is all.

Mr. Harris: If your Honor please, in view of counsel’s stipulation, we would respectfully request to introduce these exhibits that were mentioned in the testimony of Mr. J. G. Reed, and which were introduced in the Police Court, and have them take the number, the appropriate numbers here in this court.

Mr. Pemberton: Except the general objection which we have made to all offers of evidence of this class.

The Court: Let the general objection be overruled, and let them

be admitted in evidence and be marked with such numbers as they follow in consecutively.

Mr. Harris: If your Honor please, at this time I would like to state that Mr. Calkins and I, in behalf of the District Attorney's office, owing to Mr. O'Connor's illness, stated to him that we would respectfully request your Honor to adjourn when we finished reading the testimony of this witness, and we told him that, as far as we were concerned, we would make that request to you.

Mr. Pemberton: We ask, on behalf of Mr. O'Connor, who is a very sick man, that the Court do not go on with this trial tomorrow; it would only be two hours—ten to twelve, anyway—and the afternoon is a half holiday, and Mr. O'Connor is a very sick man.

The Court: I think your request is entirely reasonable. I will grant it.

Ladies and gentlemen of the jury, we will now adjourn until ten o'clock Monday morning. You are admonished at this time not to [fol. 261] converse among yourselves or with any other person upon any subject connected with the trial of this case, or to form or express an opinion thereon until the case is finally submitted to you, and you are further admonished not to read articles in any print, whether newspaper or other document, concerning or connected in any way with this trial, or any subject connected with the trial.

Swear the officers.

(Officers sworn to take charge of the jury, and an adjournment was taken until Monday, February 2, 1920, at 10 o'clock a. m.)

[fol. 262]

Monday, February 2, 1920.

The Court: People against Whitney. Has the Doctor arrived yet? (Discussion.) The Doctor will be down immediately. He has been telephoned for at Merritt Hospital. It will just be a few moments, and we will not call the other case until then.

10.45 a. m.

The Court: People against Whitney.

Mr. Harris: Ready for the People, if the Court please; that is, we are ready to take the report of the Doctor. We would ask to have the jury polled at this time, to be sure, inasmuch as this was over Sunday.

(Thereupon the jury were polled, and all answer "Present" with the exception of Jurymoman Lucille Stegman, who was not present.)

The Clerk: Lucille Stegman, one of the regular jurors, does not answer, your Honor.

Mr. Harris: If your Honor please, it was called to the attention of Judge Pemberton, representing Miss Whitney, and our office, and I believe to your Honor, that one of the jurors, Mrs. Lucille Stegman, had been taken ill while at the Hotel Oakland, and that the

service of a doctor was necessary, and they called in Dr. Clark, who diagnosed it as influenza, and recommended that she immediately be taken home so that she might have the proper care and treatment, and that was done. Judge Pemberton and I spoke of the matter Saturday afternoon, and the Judge said that he was perfectly willing to stipulate that such action be taken as the doctor advised, namely, taking her home, and that she be discharged, and in her place Mrs. Haynes, who was the alternate juror, be selected and sworn in to try this case. Am I correct, Judge?

Mr. Pemberton: The statement made by Mr. Harris is strictly correct. I would suggest, however, that now, owing to other matters that have arisen, that it might be as well not to discharge the juror, but what I said to Mr. Harris I stand upon if need be, only making this suggestion, your Honor: Mr. O'Connor is a very sick [fol. 263] man. He, not I, undertook to try this case, as far as the trial was concerned, and Miss Whitney herself is sick this morning, and it is my judgment, though I am not an expert on that subject, that she has the influenza in its incipency, and we might, under the circumstances, go on, and when we can go on maybe we had better have the thirteenth juror because somebody else, some other juror might be sick also. Mrs. Stegman has heard all the evidence that any of the others have, and when Mr. O'Connor is able to come back, and Miss Whitney is able to come back, and we are able to resume the trial, Mrs. Stegman may be available and somebody else not. I am merely making that as a suggestion.

Mr. Harris: I must say that Judge Pemberton's statement does appeal to me as being a proper one under the circumstances, and he, as I understand Judge Pemberton, was going to ask for a continuance. Am I correct, Judge?

Mr. Pemberton: What's that?

Mr. Harris: That you were going to ask for a continuance.

Mr. Pemberton: Yes, we will have to ask for a continuance, under the circumstances.

The Court: Well, let us hear from the Doctor now, as to the condition of the juror first.

W. A. CLARK, a witness called on behalf of the People, being first duly sworn, testified as follows:

Direct examination.

Mr. Harris:

Q. Dr. Clark, you are a duly licensed, regular practicing physician and surgeon of this City and State, are you not?

A. Yes.

Mr. Harris: I presume that you will admit the Doctor's qualifications?

Mr. Pemberton: Oh, yes; certainly.

Mr. Harris:

Q. Doctor, you had occasion to visit, in a professional capacity, a Mrs. Lucille Stegman at the Hotel Oakland on Saturday last?

A. Yes.

Q. And what did you find out to be——

A. On my first visit——

[fol. 264] Q. (Continuing:)—her physical condition?

A. On my first visit her physical condition, I found she had a temperature, headache and backache, and there was a suspicion of influenza, and I asked Dr. Glenn, of Merritt Hospital, to make a blood count for me, which confirmed the suspicion that she did have it, and I then advised those in charge that the wiser thing, considering the serious nature, as all of us know, of influenza, that the wiser thing would be to send her to her own home and have her own doctor look after her.

Q. That is, you advised the Sheriff's office, who had her in charge as a juror, to permit her to go home immediately?

A. Yes.

Q. And, at your suggestion, an ambulance was called and she was taken home?

A. An ambulance was called and she was sent home.

Q. Have you visited her since then, Doctor?

A. No, I have not; but she is in the hands of a very competent man, who used to be one of my interns.

Q. What is your opinion, Doctor, that she was suffering from influenza when you ordered her home?

A. Yes.

The Court:

Q. You found that not only from the symptoms that were taken at the time that your first visit took place, but also from a report of a blood count, is that right?

A. Yes.

Mr. Harris:

Q. Doctor, from your experience and knowledge of medicine and physical conditions, could you give us any idea as to when you might say that she would be able to attend this court as a juror?

A. That cannot be set, sir, because, with influenza, it is a known treacherous disease, because it may pursue a very mild course, and very suddenly develop pneumonia, and end fatally, and it would be impossible to prophesy or give you any idea when she would be back.

Q. Well, what would be your idea as to the least possible time within which she might be here?

A. Well, I should say ten days—at least ten days.

Mr. Harris: I think that is all.

Mr. Pemberton: The defense is satisfied with the showing. As I have stated, I am not charged with the responsibility of the trial [fol. 265] in this case. Mr. O'Connor was to attend to that. I

came here Tuesday morning expecting to withdraw from the case because I had other work to do, and leave the case altogether in his hands, but he requested me to remain, and I have done so up to this time; but now, in his absence, and at the express request of Miss Whitney herself, it is absolutely necessary, in the cause of justice, that we ask a continuance for at least a week. My information is that Mr. O'Connor cannot be expected to be back in less than that time, and I believe, as I have stated, that it is my judgment at the present time—it may not prove to be in the case—but that Miss Whitney is herself beginning to be sick with the same trouble, as she sat right beside him at this table. Are you satisfied with the showing of Mr. O'Connor's condition?

Mr. Calkins: I am satisfied that Mr. O'Connor is unable to be here this morning. But, in connection with the motion which Mr. Pemberton has made, your Honor, I must say that I have, and I think we all have, as Mr. Pemberton has been before the Court a number of times, the very greatest respect for his word and the very greatest respect for his ability. It was my understanding, and the understanding of our office, that Mr. Pemberton was Miss Whitney's attorney in this case, and, in fact, he has so acted from the very beginning, and we must, I think, in considering this motion, consider the other parties besides ourselves—the jury and the County. With respect to the jury, we all know that it is a hardship on them to be kept away from their businesses, and yet the necessities of the case have seemed to the Court to require that they, for the time being, should be, and that therefore they should not be kept any longer than the requirements of the case absolutely necessitate.

Furthermore, we must remember that this is a very great expense to the County, particularly with the jury being kept as it is. Now, the District Attorney's office is disposed to extend every opportunity to Miss Whitney, and to concede, as far as may be consistent with that view, in the request made by Judge Pemberton. We feel that Judge Pemberton is better acquainted with the case, perhaps, than [fol. 266] anybody else; he has been in it longer and certainly knows it, and of his capacity and ability there can be little question, and, as we understand it from Mr. O'Connor's own words, he came into the case rather late to assist, or possible even taking Mr. Pemberton's view of it, to take charge in a way of the trial, and yet still to have Mr. Pemberton with him, and we feel, in view of those circumstances, that a continuance of two days, that is, until Wednesday morning, would be ample to meet the requirements of this case, and I would say to Miss Whitney that if, in that time, she feels that she requires the assistance of other counsel in the trial of the case, that that two days should provide the opportunity to let that counsel study the case, and the transcripts are written up, typewritten, and all the facts of the case could be presented through them to other counsel, and that opportunity, we believe, should be afforded, but not a continuance of so long a time as is requested, realizing the appeal—

The Defendant: I should like to speak on this matter myself.

Mr. Pemberton: I request, your Honor, that she be allowed to speak.

The Court: I would rather have the counsel speak and take charge.

The Defendant: I do not consider that Mr. Pemberton is my counsel in my trial case, and any one who has sat through this last week in this court knows that Mr. O'Connor has charge of my case. I am an American citizen; I am not here to ask for sympathy, I am here to ask for justice, and you must remember that I am on trial for an offense which carries a penalty of fourteen years imprisonment, and therefore I think I am entitled——

The Court (interrupting): Miss Whitney, we might direct you—you might direct your remarks to the matter of this continuance, if you desire, but you are going very far afield with this.

The Defendant: Mr. O'Connor is an ill man, and I feel he will not be able to take charge of the case within two days, and I would be very glad to put this in evidence. (Showing letter.)

Mr. Harris: Miss Whitney showed me a letter from Dr. Gallwey, stating that Mr. O'Connor was very ill, and that she would like to ask that that be introduced for the purpose of showing it.

The Court: Let it be admitted in connection with the hearing [fol. 267] of this motion.

Mr. Pemberton: And the fact that it is not sworn to is waived, is it?

Mr. Harris: Certainly.

Mr. Calkins: Certainly.

The Court: Dr. Gallwey's statement would be taken by the Court, and I think by all counsel, or by any of us.

Mr. Pemberton: You, of course, will waive all the technical requirements of that?

Mr. Calkins: Certainly, we are perfectly satisfied with that letter.

The Court: Let me ask, gentlemen, what you desire in the way of the ruling concerning the absent juror.

Mr. Pemberton: I have spoken to Miss Whitney, and we are willing that the order of the Court heretofore giving the jury to the custody of the sheriff may be rescinded, and that we will waive all right to object thereto, and trust to the honor of this jury to talk with no one, and let no one talk with them, as is done in usual cases. That will save the County and the jury——

The Court: I had in mind, rather, whether I should at this time discharge the juror who is ill.

Mr. Harris: If your Honor please, in regard to that, I think that Judge Pemberton's suggestion was proper, that we might pass that until such time as your Honor saw fit to continue this case, if you are willing to do that. In other words, the Judge's suggestion is, not to discharge this one juror at this time, but it would be best to wait until such time as the case was continued to.

Mr. Pemberton: That is all right. Is it to you? (Addressing the defendant.)

The Defendant: Yes, I suppose so, if that is satisfactory to you, Mr. Harris and Mr. Pemberton.

The Court: Let the case be continued until 10 o'clock Wednesday morning. Ladies and gentlemen of the jury, you are now admonished not to converse among yourselves, or with any other person, upon any subject connected with the trial of this case, or [fol. 268] to form or express an opinion thereon until the case is finally submitted to you. Let the officers be sworn. (Officers sworn to take charge of the jury.) I will say to the officers that, in dealing with the public that are attending this trial, that they shall permit them to enter as they come and take the seats behind the rail, but do not, however, permit these seats within the rail to be filled. The Court has in mind now not only the health of those who come here, but also of this jury and the officers of the court, including the counsel and the defendant as well, of course. There have been two cases of influenza contracted since the beginning of this trial, and it seems that common sense requires that order of the Court. You will understand, ladies and gentlemen of the public who are here today, that the Court does not desire to restrict you in any way; you are at liberty to come here at and all times, but that the capacity of the courtroom must be limited to that. Let this letter of Dr. Gallwey's be filed.

(Said letter reads as follows:

"February 1, 1920.

"Mr. Thomas O'Connor is under my personal care. He is confined to bed, and is suffering from an attack of influenza.

"Under date of February 1, 1920.

John Gallwey, M. D."

The Court: In the event—I would say that in the event of the jurors at any time desiring something, or any advice as to their health, will it be stipulated that they may call in the doctor?

Mr. Calkins: Yes—I was just going to say that it might be well, your Honor.

Mr. Pemberton: Yes, your Honor.

The Court: Of course, there is to be no discussion in the case, ladies and gentlemen; it shall be only in the presence of yourselves and some of the assistants, the bailiffs of the court, in other words.

[fol. 269]

Wednesday, February 4, 1920.

The Court: People against Charlotte Anita Whitney.

Mr. Pemberton: Not ready, your Honor. Miss Whitney is able to be out and is in Court, but is not well.

The Court: We better call the jury. People against Whitney.

(Thereupon the jury was polled, and all answered "Present" with the exception of Jurywoman Lucille Stegman.)

The Clerk: All the jurors are present except the regular juror Lucille Stegman, your Honor.

The Court: All the jurors are present, I am informed by the Clerk, on polling them, with the exception of Lucille Stegman.

Mr. Pemberton: No point is made on her absence. The reason of her absence was stated at the last session of the court when we were here, and I understand the reasons.

The Court: I rather take it now that it becomes the duty of the Court to discharge the juror.

Mr. Pemberton: We are unable to go on with the trial this morning. Miss Whitney is herself still sick but able to be around, but coughing severely, and Mr. O'Connor—Mr. Harris, what did Mrs. O'Connor say in that regard?

Mr. Harris: I telephoned to Mrs. O'Connor this morning, and she told me that he was very ill, that he was delirious a portion of the night.

Mr. Pemberton: What, if anything, did she say as to his mental attitude towards this case?

Mr. Harris: She said that he was very much worried over the outcome of this case, and that she thought that a continuance of this case might relieve him mentally, at least.

Mr. Pemberton: From my information, I think it is dangerous to Mr. O'Connor to be unable to tell him that the case is postponed. Miss Whitney tells me that she tried to get other counsel, and did not succeed—it is not to be wondered at, under the circumstances, for I doubt if any counsel, unless it was some one with a very good opinion indeed of his own ability, who would think himself able to [fol. 270] come in at this stage of the case and do justice to the defendant, Miss Whitney, and I will state now, in open court that it is strictly true that she does not consider me her attorney for the purpose of the trial and the matters before the jury, and I think I have once before told the Court that I had made arrangements to turn the case over to Mr. O'Connor when the jury trial began, but that, at his request, was to stay at least until our respective managements of the case had so overlapped, and that I had given him all the assistance that I could, and had given him the viewpoints on matters that had arisen before he came into the trial. This case cannot be tried, considering the great responsibility involved, with justice to the defendant, without Mr. O'Connor's presence or without a very considerable time to allow another attorney to get in and take charge of the case.

The Court: I do not know anything more about the condition of Mr. O'Connor than counsel at the Bar have just stated. I noticed him here on Friday and could, as you know, tell that he was sick, and I learn now that he is delirious, and it was stated the other day in court that he was suffering from influenza. If this case was to go over for such a time that would allow Mr. O'Connor to recover from his illness, it would probably have to go over probably for a period of some time. It would strike me that the course of influenza, and particularly where a patient becomes delirious, that it takes at least three or four weeks to sufficiently recover. I don't know how we can do that.

Mr. Pemberton: At least, it would save Mr. O'Connor from the worry, and make a difference between the recovery and non-recovery, if there were a reasonable continuance and a time that he might

recover, or a time that somebody else might have familiarized himself with the case.

Mr. Calkins: I do not see the possibility of complying with what, under the circumstances, would be a reasonable continuance of the case. We must bear in mind that Mr. O'Connor said when he came into this case that he was unfamiliar with it and wanted it continued for several days at that time.

[fol. 271] The Court (interrupting): He first asked for a week by reason of the illness of his daughter; then he later asked for two days, if my memory serves me correctly, in order to familiarize himself with the case.

Mr. Calkins: He must not forget the affidavits which are on file in this court relative to the attorney in the case, and in which it is stated that Mr. Pemberton is the attorney in the case, stated both by the defendant and by counsel himself.

The Court: Do I understand that the People are not consenting to any continuance, is that it?

Mr. Calkins: It does not seem possible, under the circumstances, I can't see that this is a problem which can be solved by a continuance of a day or two, and to get a continuance of two weeks would be impossible.

Mr. Pemberton: Give us one week. We will consent that the jury may be dismissed from the care and custody of the sheriff.

The Court: I don't know that counsel can consent that the jury be excused from the custody of the sheriff, I don't know as you can, as the Court ordered it, the Court order is the grounds of their being in the care and charge of the sheriff. Let the motion for a continuance be denied.

Mr. Pemberton: If the Court please, just a minute——

The Defendant: Your Honor——

The Court: Just a minute—you have been represented by your counsel.

The Defendant: I am not represented by my counsel, your Honor.

The Court: You are represented, and you will proceed here by your counsel.

Mr. Pemberton: I withdraw from the case, if the Court please.

The Court: The Court will not permit you to withdraw at this time.

Mr. Pemberton: If the Court please, as I view my oath as an attorney, and as I view my duty to justice and to my client, I cannot go on with this case without her consent, and certainly I doubt very much if I would be willing to do it with her full and complete consent [fol. 272] sent. I cannot go on with the case.

The Court: I am sorry to say that the Court cannot permit you to withdraw. I would be glad to but, under all of the circumstances, this would not be the proper time for the Court to grant any such request, Mr. Pemberton.

Mr. Pemberton: The judge of the Court is not the keeper of my conscience.

The Court: Nevertheless, the Court will not permit the counsel to withdraw.

Mr. Pemberton: I decline to go on with the case.

The Court: Then we will proceed and we will continue with the case. You must go on, Mr. Pemberton.

Mr. Pemberton: It probably will mean Mr. O'Connor's life, and it may mean a miscarriage of justice to this defendant.

The Court: I believe that you are a very able lawyer and capable of taking care of the case, Mr. Pemberton.

Mr. Pemberton: May it please the Court, may I speak?

The Court: Yes sir.

Mr. Pemberton: There is one infirmity from which I have suffered all my life, and that is a very hot temper. It sometimes is a surprise to me, and gets away from me without sufficient cause and provocation. That was one reason that Miss Whitney got another lawyer in the case, because I told her of that infirmity and I told her that so deeply was I impressed with her innocence and with her fine character, and so deeply was I impressed with the feeling that she was being prosecuted and attempting to be convicted by the trickery here, that my temper could not be trusted, and that I could not, for that reason, because of that infirmity, try this case safely. The Court has seen a little illustration of that, of my infirmity, in the course of this trial. I go for months, and sometimes a year, when I think myself and my clients are being treated right, it is very troubling indeed, but I am not in the condition or frame of mind or view toward this case to try this case with justice to the defendant.

The Court: Let us proceed.

Mr. Harris: Had we called the names of the jurors?

[fol. 273] The Clerk: They have been polled.

Mr. Pemberton: May it please the Court—

The Court: In respect to the juror Mrs. Stegman, the Court at this time feels that it is proper that the juror, on the showing made the other day, on continuing this case until today, that she should be discharged, and that Mrs. Haynes, the alternate juror, should be now substituted in her place and stead.

Mr. Harris: If your Honor please, your Honor is looking up the section—

The Court: The proper procedure would be, not that the Court should order the alternate juror Mr. Haynes to take the place of the other juror, but that the Clerk now draw the name of the alternate juror. The section reads: "If before the final submission of the case, a juror dies or becomes ill so as to be unable to perform his duty, the Court may order him to be discharged, and draw the name of the alternate, who shall then take the place in the jury-box and be subject to the same rules and regulations as though he had been selected as one of the original jurors." So at this time let the record show the order of the Court discharging the juror Mrs. Lucille Stegman, and the Court will draw the names of the alternate. The Clerk will now draw the name, to comply with the language of the statute.

Mr. Pemberton: May the Court please, may I have a few minutes to consult with Miss Whitney? I will go to jail before I will go on with this case without her consent.

The Court: Just as soon as we finish, I will be glad to — any period of time—ten minutes?

Mr. Pemberton: Yes, your Honor.

The Court: Yes, indeed, you may have that time. The Court will now place the name of the alternate juror in the box and draw the alternate juror.

The Clerk: The name is now in, your Honor.

The Court: Draw the name.

The Clerk (drawing name): Mrs. W. E. Haynes.

The Court: Mrs. W. E. Haynes may now be substituted as a regular juror in the place and stead of Mrs. Lucile Stegman, who [fol. 274] has been discharged. Now, you should like to take ten minutes, Judge Pemberton.

Mr. Pemberton: Yes, your Honor.

The Court: Very well. Ladies and gentlemen of the jury, we are about to grant you a recess of ten minutes. The officers will be sworn. (Officers sworn to take charge of jury). You are admonished at this time not to converse among yourselves or with any other person upon any subject connected with the trial of this case, or to suffer anybody to converse with you, or to form or express an opinion thereon until the case is finally submitted to you.

(A recess is here taken for five minutes.)

After Recess

The Court: Are you willing, gentlemen, to stipulate that the jurors are now present, or would you rather have them polled?

Mr. Harris: I will stipulate that the jury is present, yes, your Honor.

The Court: Had we better poll the jury?

Mr. Pemberton: The jury are all present, your Honor. So stipulated.

The Court: Very well.

Mr. Pemberton: Miss Whitney wishes to make a request of the Court.

The Court: Well, what sort of a request is it? Do you know what it is, Mr. Pemberton?

Mr. Pemberton: I do.

The Court: On the proposition of the matter of the continuance?

Mr. Pemberton: On the matter of a short continuance, to enable her to see if she can get another attorney. Then I will cease my—

The Court: That matter has been considered by the Court, and the motion and request has been denied, so I take it that it is not necessary to make any further comment on the matter or any further request. You should proceed with this matter. Call the witness.

The Defendant: I should like to make a statement.

The Court: This is not the time for statements to be made.

Mr. Pemberton: We save an exception to the Court's ruling.

Mr. Calkins: Call Mr. Thompson.

[fol. 275] FENTON THOMPSON, recalled for cross-examination.

Mr. Calkins: We have concluded our direct examination of this witness.

Mr. Pemberton: We desire to reserve the cross-examination of this witness until we can get certain data that is in the hands of Mr. O'Connor and not available to us just at the present time.

The Court: Very well, you may withdraw from the witness-stand. [fol. 276] Mr. Calkins: I would ask permission of the Court at this time to read the ballot. It purports to be "Ballot for delegate to the Emergency National Convention of the Socialist Party of Chicago," August 30, 31, and September 1, 1919—"how to vote. Below is the list of candidates. Choose them in keeping with your preference. If there is one in particular you wish to be a delegate, place the "figure '1' opposite his name. Place the figure '2' after your second choice. Place the figure '3' after your third choice. Place the figure '4' after your fourth choice, and continue this process down through the whole list, leaving those, of course, that you care least to have elected to the very last.

"Bauer, Casper—San Jose	No.	Blank space.
"Beals, Elvina S.—Berkley	No.	Blank space.
"Bedacht, Max—San Francisco . . .	No.	Cross in space. Check after it.
"Benedict, Addie M.—Lodi	No.	Blank space.
"Dolsen, James H.—San Francisco . .	No.	Cross in blank space, check after that.
"Feeley, Thomas—San Francisco . .	No.	Blank space.
"Golos, M. J.—Los Angeles	No.	Blank space.
"King, Cameron H.—San Francisco .	No.	Blank space.
"Lewis, Lena Morrow—Los Angeles	No.	Blank space.
"McKee, Harry M.—Fresno	No.	Blank space.
"Molle, Jesse—Oakland	No.	Blank space.
"Ragsdale, J. A.—San Francisco . .	No.	Cross in blank space, and check.
"Roser, Henry H.—Los Angeles . .	No.	Blank space.
"Ryckman, J. H.—Los Angeles . .	No.	Blank space. Blue pencil line drawn through the whole name and address.
"Shapiro, Chaim—Los Angeles . .	No.	Blank space. Blue pencil line drawn through the name and address.
"Smith, Edrie B.—Oakland	No.	Cross in blank space, and check.
"Smith, Irene M.—Los Angeles . . .	No.	Cross in space, and check.
"Taylor, John C.—Oakland	No.	Cross in blank space, and check.
"Tilton, Blanch, Pomona	No.	Blank space.

"NOTICE—Members must sign their names to the ballot. All ballots must be handed into the Local Secretary before the count is

"made. All ballots must be handed or mailed to the office of the State Secretary on or before Saturday, August 16, 1919, 211 Bacon Building, Oakland, Calif.

(Signed) Charlotte Anita Whitney, of Local Oakland."

[fel. 277] Mr. Calkins: Will you mark that? Then I will show it to them.

Q. Mr. Kyle, I will ask you whether, on the occasion of any of your visits to Loring Hall, you saw the defendant, Miss Whitney, present at Loring Hall?

A. I have.

Q. When was that?

A. I saw the defendant in Loring Hall immediately after the 17th day of November of last year, on the 18th day of November of last year, the day following or the second day following. I saw her again in the month of December in Loring Hall, and I saw her on the 5th day of January of this year in Loring Hall.

Q. In what part of Loring Hall did you see Miss Whitney on those occasions?

A. In the offices and the part occupied by the Communist Labor Party.

Q. On the occasion that you first saw her, was there any one else present that you knew of?

A. There were other members of the Party that I knew coming and going; the one particularly that stayed there was Reed, John Reed, the secretary.

Q. That is J. G. Reed, who has been referred to as the secretary of Local Oakland?

A. Yes.

Q. On the other occasion subsequent to that, in December, how about that?

A. She was present there. There was, I should judge, four or five people besides herself; there was two, I believe, I recognized and know by name.

Q. Who were they?

A. There was one gentleman sitting in the front seat here, his name is Engels, a youth, and another time I was there Mr. Snyder, the editor of "The World," came and went during the time she was there.

Q. That is J. E. Snyder, who was here in court as a witness?

A. Yes.

Mr. Calkins: You may take the witness.

Cross-examination.

Mr. Pemberton:

Q. Mr. Kyle, which is the superior, yourself or Fenton Thompson, as an officer in the Police Court?

Mr. Calkins: We object to that question as not a proper question on cross-examination. It makes no difference who is the superior; it is not competent, relevant or material.

[fol. 278] The Court: Well, let the motion or answer be overruled.

A. Our rank is the same.

Mr. Pemberton:

Q. What information have you as to the approximate number of the members of the Communist Labor Party in the City of Oakland?

A. Again, please? (Question read.) We are perfectly sure——

Mr. Calkins (interrupting): Now, if your Honor please, if the witness knows—I imagine it may be hearsay testimony.

The Court: He is testifying as to what he knows, of course. That is what Mr. Pemberton meant, I take it.

Mr. Calkins: If he has seen the roll, he can testify.

A. My knowledge of the personnel of the Communist Party is practically this: Of the names of people who have signed the charter rolls and organized the Communist Labor Party, and people who are of the Communist Labor Party, telling me so themselves.

Mr. Pemberton:

Q. Well, approximate the number.

Mr. Calkins: If your Honor please, I think he has shown that he cannot state the number because it is hearsay.

The Court: I don't know that he cannot.

Mr. Calkins (continuing): Of his own knowledge.

The Court: Don't interfere. Let the witness answer if he can.

A. I will say that everybody under indictment in this county, under this law, with the exception of the defendant in this case, has told me that they were members of the Communist Labor Party.

Mr. Pemberton:

Q. That is not answering my question. I want you to approximate the total number.

A. To the best of my judgment——

Mr. Calkins (interrupting): Now, if your Honor please, I object to that as not a proper question.

The Court: Not to the best of your judgment; what you know of your own knowledge is what he wants.

Mr. Calkins: That is what he wants to know.

A. That will be the extent of my knowledge.

Mr. Pemberton:

Q. Are there as many as five hundred?

[fol. 279] A. I would judge in Oakland——

Q. In Alameda County?

A. You are asking for my judgment now?

Mr. Calkins: We object to that as not a proper question. If he is asked for his knowledge, there is no objection.

The Court: State your knowledge.

A. I won't say.

Mr. Pemberton:

Q. Is it not more than five hundred?

Mr. Calkins: Same objection, your Honor.

The Court: Let him answer, if he knows.

A. If you want my judgment, I could say it was well over that.

Mr. Calkins: If your Honor please, I think if you instructed the witness at this time that we want his knowledge and not his judgment, it would be well.

The Court: Yes, we want your knowledge, that is all, Mr. Kyle. State your knowledge, what you know.

A. I don't know.

Mr. Pemberton:

Q. Do you know who picks and chooses as to what few of those many that shall be arrested and prosecuted?

Mr. Calkins: We object to that question as not competent or material. If it tends to show animus on the part of this witness—

Mr. Pemberton: You may find out, on the part of somebody.

Mr. Calkins: Well, we withdraw the objection.

A. I myself practically dictated every person who was arrested, and when they should be arrested.

Q. You were the person who dictated and chose them, are you?

A. No, I didn't, not on my own judgment alone; I took the matter up with several different people, and it was the best judgment of many, but I myself—

Q. (Interrupting.) Had the final determination?

A. No, not that. I think my judgment in the matter was followed as to the people that should be arrested.

Q. And you directed the arrest of Miss Whitney?

A. I did not direct it; I advised.

Q. And that advice was followed?

A. It was.

Q. When was she arrested?

A. I would have to refer to a record.

[fol. 280] Q. Was she not arrested on the evening of the 28th of November?

A. I should say she was.

Q. From the time of the supposed organization of the supposed Communist Labor Party on the 9th, nineteen days elapsed before she was selected as one of the victims of arrest and prosecution?

A. We have indicted and arrested what we think is the leaders of

the Communist movement in this part of the country; we have let the other followers alone.

Q. Now, as a matter of fact, Miss Whitney immediately before her arrest had made an address on the negro problem in the United States before the Oakland Center of the Civic League, had she not?

A. She had.

[fol. 281] Mr. Calkins: Just a moment—that question, I think, may be proper if properly separated, to include first this witness, and then he may ask the other questions which might be subject to another objection.

The Court: Let the question be answered.

A. Why, no, I knew scores of people in there to be prominent, respectable citizens.

Mr. Pemberton:

Q. Do you know why any action was ever made to their hearing Miss Whitney?

A. We had no objection to them hearing Miss Whitney.

Q. In bulk, how much literature did you take away from Loring Hall?

A. Oh, perhaps a ton.

Q. About a ton?

A. Perhaps more than that; I guess it would approximate around a ton.

Q. Now, there was some that even you considered quite harmless, wasn't there?

A. Well, all their literature is not "red." There is some of it that you can consider safe to read.

Q. Why, then, do you consider any of it unsafe to read, lest you might be convinced that they were right because of its doctrines?

A. Because the doctrines of that party, as stated in some of their literature and in their platform, is decidedly un-American and is against this government as it stands today.

Q. That is, you being the judge.

A. As I, as an American, would judge it.

Q. How long have you been an American?

A. All my life; born in this country.

Q. So was Miss Whitney, was she not?

A. I don't know.

[fol. 282]

Thursday, February 5, 1920.

The Court: People against Whitney. Will counsel stipulate that all the jurors are present?

Mr. Harris: The People will so stipulate, your Honor, yes.

Mr. Pemberton: The defendant also.

The Court: The illness of one of the jurors has been brought to the Court's attention, and Dr. Curdts was sent for and is now in

court ready to take the stand and testify as to the condition of the juror.

Mr. Pemberton: I talked with Dr. Curdts, and am satisfied from what he tells me, without his being put upon the stand, that the juror is ill and that it would be a great wrong to the juror to try to hold him in the box under the present circumstances.

Mr. Harris: If your Honor please, I did not ask Dr. Curdts just exactly the nature of the illness. I would like to ask him that one question.

The Court: All right. Do you want to do that?

Mr. Harris: Yes, I might then ask him.

The Court: It was just to save time that Mr. Pemberton stipulated. Take the stand, then, Doctor.

C. E. CURDTS, a witness called on behalf of the People, being first duly sworn, testified as follows:

Direct examination.

Mr. Harris:

Q. Doctor, you have had occasion to examine Mr. H. A. Thompson, one of the jurors in this case?

A. Yes.

Mr. Harris: And you will, of course, admit the Doctor's qualifications as a physician?

Mr. Pemberton: Certainly, yes.

Mr. Harris:

Q. What do you find his condition to be, and what recommendation do you make as to the injury as to his health in sitting here during the course of the trial today?

A. He seems to be suffering this morning from an acute intestinal condition, and his condition is not so that I believe that he should [fol. 283] be sitting here. I think he should be sent back to the hotel, where he can rest and take a little treatment, and maybe tomorrow he will be all right.

Q. That is your best judgment?

A. Yes.

Q. Do you feel that if he is to sit here during the day that it is possible that he will grow worse?

A. Yes.

Q. If he is given rest and treatment between now and tomorrow morning, do you feel that the chances are that he will be able to recuperate and be sufficiently well to attend this cause as a juror?

A. Yes, I think so.

The Court: Very well, then, we will adjourn now until ten o'clock tomorrow morning. That is satisfactory to both sides, I understand?

Mr. Harris: Yes, your Honor.

Mr. Pemberton: Certainly.

The Court: Very well, we shall adjourn until ten o'clock tomorrow morning, and the jury are admonished at this time not to converse among yourselves or with any other person upon any subject connected with the trial of this cause, or to form or express an opinion thereon until the cause is finally submitted to you.

Swear the officers.

(Officers sworn to take charge of the jury.)

(Whereupon an adjournment was taken until tomorrow, Friday, February 6, 1920, at ten o'clock a. m.)

[fol. 284]

Friday, February 6, 1920.

The Court: People against Whitney.

Mr. Harris: Ready for the People.

Mr. Pemberton: Ready.

Mr. Harris: If your Honor please, Dr. Curdts has informed me that the juror, Mr. Thompson, who was sick yesterday, is still sick. I have had a talk with Mr. Pemberton, and he has informed me that he would waive the bringing of the jury into court at this time, and take no exception to the fact that they are not in court, and we would like to put Dr. Curdts on the stand and find out the condition of Mr. Thompson, and how soon in Dr. Curdts' judgment Mr. Thompson would be available as a juror in this case.

The Court: That is correct, is it, as to the waiver?

Mr. Pemberton: That is correct.

The Court: You were sworn yesterday and you are still under oath, Doctor.

C. E. CURDTS, recalled for further Direct Examination.

Mr. Harris:

Q. You have visited the juror, Mr. Thompson, since yesterday morning, have you?

A. Yes.

Q. What have you found his condition to be?

A. Well, I was there at the hotel this morning a little after eight o'clock to see how his condition was this morning. Yesterday he suffered all day, practically, and I found that he had a poor night; but this morning I found that his acute condition had subsided but that it left him in a very weakened condition; in fact, so weakened that I feared the old gentleman could not even sit up for any length of time. He had no fever, but his pulse was rapid and weakened to such an extent, from the effects of his sickness yesterday, that, in my judgment, I felt—I feel that he should be allowed to remain in bed today, on a very soft and selected diet, and then possibly by Monday he ought to be in good shape to resume his duties as a juror.

Mr. Harris: Any cross examination?

Mr. Pemberton: No cross examination.

[fol. 285] Mr. Harris: You have no objection to the matter being continued until Monday morning at ten o'clock, then?

Mr. Pemberton: None.

Mr. Harris: If, in his Honor's judgment, he sees fit to continue it until such time.

The Court: Then, in accordance with your understanding, do I understand that all matters and objections are waived in regard to the jury, as I understand it, not being present?

Mr. Pemberton: They are waived.

The Court: Then let the case be continued until Monday morning at ten o'clock. The jury is still in the custody and care of the officers that were sworn on the last occasion of the court, are they not, Mr. Smith?

Bailiff Smith: Yes, we were sworn yesterday.

The Court: Yes.

(An adjournment was here taken until Monday, February 9, 1920, at ten o'clock a. m.)

Monday, February 9, 1920.

The Court: People against Whitney. Will counsel stipulate that all the jurors are present?

Mr. Harris: We so stipulate.

Mr. Pemberton: So stipulated for the defendant.

Thomas O'Connor, attorney in the case, will never try another case on earth. It seems to me that it is not fitting that on this, the day of his funeral, this case should proceed. I move, therefore, that the case be continued until tomorrow morning at the usual hour, and that when this court adjourns, it do so out of honor to his memory. One of the last things that he spoke of rationally consisted of a request that Nathan C. Coghlan, his personal friend, should take up the burden that he had to lay down in this case. To this Mr. Coghlan has consented, and, as he knows Mr. O'Connor's record and career much better than I, I would ask that when he appears in this case he be allowed to give a short tribute to the memory of the [fol. 286] man who has passed on, and who was a credit and an honor to our profession, and that the same be entered in the minutes of this court.

Mr. Decoto: If the Court please, in the matter of the continuance, I think that it is only meet and proper that the case should be continued until tomorrow morning. I have known Mr. O'Connor intimately for many years, and I held Mr. O'Connor's memory in the highest esteem. He was of the finest characters and one of the best lawyers and one of the most lovable men that it has ever been my good fortune to number among my friends.

I think, when we adjourn, we should also adjourn out of respect to the memory of Mrs. Stegman, one of the jurors in this case, as well as out of respect to the memory of Mr. O'Connor.

Mrs. Stegman gave to this court the best service that she could give. We were glad to have her here as one of the jurors, and her

service to this county was good and faithful service. So, in joining in the request of Mr. Pemberton that the case stand over until tomorrow morning, I move that it stand over out of respect to the memory of both the parties whom we held so dear.

The Court: I have known Tom O'Connor for fifteen years, and I do not know of any death that has shocked me more than his. He was one of the most lovable men, as you have stated, Mr. Decoto, and you also, Mr. Pemberton, that it has been my good fortune to have ever met and known. He was an able counsellor—he had that keenness of observation and that quickness in grasping new situations, and a wide range of knowledge, that made him a man of almost superhuman ability in the profession of the law. I know of no better trial lawyer than Tom O'Connor, and I know of no more honest and loyal advocate than he. Tom O'Connor was always assiduously concerned in the interest of his client; he never for one moment forgot that every talent that was in him should be exercised in an effort to present the rights of every client he represented to every court and every jury.

He lived a good life; he was a righteous living man. His personal and private life was as pure as the driven snow. His honesty of purpose and his great fund of wit and humor, together with a vast experience, as well as a remarkable gift to express himself clearly [fol. 287] and eloquently, made his companionship most charming, and I deeply deplore his untimely passing. It is one of the saddest blows that has come to his friends, and surely one of the greatest losses that the profession and this State could have suffered, and I will gladly grant the continuance, and we will now adjourn until tomorrow morning at ten o'clock, out of respect to the memory of Thomas O'Connor and Mrs. Lucille Stegman, who has also rendered valiant, faithful and good service as a juror in this court, and in the various departments thereof, in this county, during the last three months.

You are admonished now not to converse among yourselves, or with any other person, on any subject connected with the trial of this case, or to form or express an opinion thereon until the case is finally submitted to jury. Tomorrow morning at the usual hour.

(An adjournment was here taken until tomorrow, Tuesday, February 10, 1920, at 10 o'clock a. m.)

Tuesday, February 10, 1920.

The Court: People against Whitney. Call Mr. Harris and Mr. Pemberton. Mr. Pemberton said yesterday that this morning you wanted to make a eulogy, Mr. Coghlan.

Mr. Coghlan: Why, if your Honor please, having inspected this record—at the time that I spoke to Mr. Pemberton I had not looked over this record, but I think that I would be justified in deferring any comment that I might desire to make in respect to the deceased, as I think that the record itself sets forth an eulogium that perhaps

is more eloquent than any that counsel could hope to equal, and that there is justification in the record itself of the interweaving of the potent personality of Thomas O'Connor in the very trial of this case. There are comments sufficient to justify me in drawing from them all that I desire to say, and they in themselves are far more eloquent than I think any more attempt at oratory could convey. [fol. 288] They convey in themselves an eulogium that I think no counsel could make before a jury and could fail to be affected by, so it is that I desire to defer, with your Honor's permission, any reference to that matter until such time as I can properly and in the confines of the record make reference to my friend.

The Court: I thought there was something along the line that sometimes takes place, as so happened in court yesterday, and on other occasions. Very well, then. Are you ready in this case?

Mr. Harris: We are ready, your Honor.

Mr. Coghlan: We are ready for the defendant.

The Court: I will say that on Tuesday mornings, Mr. Coghlan, we have arraignments in this court, and the jury does not come to court quite as early as they do on other mornings. We usually take up an hour or more of the morning with arraignments. So, if the bailiff will kindly ascertain about the jury, we will have them brought immediately into court.

(Jury brought into court.)

The Court: Will counsel stipulate that all the jurors are present?

Mr. Pemberton: The defendant will so stipulate.

Mr. Harris: The People will.

Mr. Pemberton: May it please the Court, I now move that the name of Nathan C. Coghlan be entered as attorney of record for the defendant in this case, in lieu of Thomas M. O'Connor, deceased.

The Court: The motion may be granted; Mr. Coghlan is now associated with the defense.

Mr. Harris: Call Mr. Thompson.

FENTON G. THOMPSON recalled for cross examination.

Mr. Harris: Gentlemen, Mr. Thompson is now on the stand for the purposes of cross examination.

Mr. Coghlan: If the Court please, I should prefer to defer cross examination of Mr. Thompson until some later moment, as his is one transcript that I have not yet had the opportunity of perusing. [fol. 289] I can do that this morning, and it is probable that we may not desire to cross examine, because I believe cross examination was waived at the last calling of this witness to the stand. However I suppose that in the light of the peculiar circumstances of this case, and the fact of the death of Mr. O'Connor, that, of course, counsel and the Court would join in the desire to accord Miss Whitney her right of cross examination of this witness as ancillary to that, of course, would be the privilege of allowing the cross examining coun-

sel to inspect the particular testimony. I do not want much time to do that, not this morning, but, having closed this morning's session, at noontime I could quite easily cover that and determine whether or not it would be necessary to the defense for the cross examination to proceed.

Mr. Harris: Personally, if your Honor please, I must say that I think that is a very reasonable request upon the part of counsel, and that we at this time withdraw Mr. Thompson, if he feels that by two o'clock he could be prepared to cross examine. It is entirely satisfactory to us.

The Court: The witness may be withdrawn.

(Witness withdrawn.)

Mr. Harris: I am going to read a few excerpts from this exhibit.

Mr. Pemberton: Do you remember the point at the present time where this was found, or how it was found?

Mr. Harris: Yes, that was found at the headquarters of the Communist Labor Party, I believe, in the Bacon Building, Mr. Pemberton. That is my judgment at this time.

Mr. Pemberton: It is a part of the ton of literature that was seized around the headquarters or the office of the Communist Labor Party?

Mr. Harris: It is part of the literature; I am not able to state whether it was a ton, or more or less, sir.

Mr. Pemberton: We object to it on the ground that it has been in no manner connected with this defendant.

Mr. Harris: In other words, that is in accordance with your general objection heretofore made.

[fol. 290] The Court: It may be overruled. Proceed.

Mr. Harris: I will read, ladies and gentlemen of the jury—

Mr. Coghlan (interrupting): Just a minute—we offer the further objection, your Honor, that no proper foundation has been laid for the introduction of this book. It does not appear but that this book—and I believe that to be true—is generally circulated throughout libraries in this country, and it does not appear but that, as a matter of curiosity, it was obtained by the library from which counsel now brings it. As a consequence of that, by reason of the fact that particularly in this country and under this flag, all sorts of literature have been allowed to pass under the eye of American citizens. It seems to me that some nearer connection than I could find in this record ought to be made between this defendant and that particular book, because, to merely educate me, your Honor, and counsel and the jury, in the matter of what is meant by "syndicalism," outside of the definition laid down in the statute, are not pertinent or material in this case. It might be by some inadvertence attributed to the defendant; that is to say, any disagreement between the articles that are thereon contained on the part of a perfectly fair-minded juror. Now, I ask you if the matter therein laid down in that book with reference to what is called "syndicalism" might be attributed to this defendant, might be fastened or charged upon her, and, as a consequence, it seems to me a better foundation ought to

be laid than counsel has laid, as far as I can see in this record. I offer that as an additional objection.

Mr. Pemberton: It does not appear, if the Court please, but what that was a mere accident. But one copy of that particular document, I think, was found there in all that mass of stuff, and it may have been there as simply a sample of what ought not to be, for all we know.

Mr. Harris: Well, let it get as to the weight rather than its admissibility, if you feel that way.

The Court: Well, that document has already been admitted in evidence as "People's Exhibit 20" it was. I know you only came into court today, you just came into the case, and I wanted to give you an opportunity to present your views, but, as I say, Mr. Coghlan, [fol. 291] it had already been admitted in evidence.

Mr. Coghlan: Thank you, your Honor.

Mr. Harris: Ladies and gentlemen of the jury, I shall now read from the book entitled "Syndicalism," by Earl C. Ford, and William E. Foster. I shall read from page 4: "Rejection of political action and acceptance of direct action. It goes without saying that for the workers to overthrow capitalism, they must be thoroughly organized to exert their combined might. Ever since the inception of the revolutionary idea, the necessity for this organization has been realized by progressive workingmen, and they have expended untold efforts to bring it about.

"These efforts have been almost entirely directed into the building of working-class political parties to capture the State—it being believed that with such a party in control of the State, the latter could be used to expropriate the capitalists. The Socialist Parties in the various countries have been laboriously built with this idea in view. But of late years among revolutionists there has been a pronounced revolution against this program. Working-class political action is rapidly coming to be recognized as even worse than useless. It is being superseded by the direct action of the labor unions." With the foot-note at the bottom: "This much maligned term means simply the direct warfare—peaceful or violent, as the case may be—of the workers upon their employers, to the exclusion of all third parties, such as politicians, etc."

I shall now read from page 9, ladies and gentlemen of the jury, beginning at about the middle of the page:

"In his choice of weapons to fight his capitalist enemies, the syndicalist is no more careful to select those that are 'fair,' 'just' or 'Civilized' than is a householder attacked in the night by a burglar. He knows he is engaged in a life and death struggle with an absolutely lawless and unscrupulous enemy, and considers his tactics only from the standpoint of their effectiveness. With him the end justifies the means. Whether his tactics be 'legal' and 'moral' or not, does not concern him, so long as they are effective. He knows that the laws as well as the current code of morals are made by his [fol. 292] mortal enemies, and considers himself about as much bound by them as a householder would himself by regulations re-

garding burglary adopted by an association of house burglars. Consequently, he ignores them in so far as he is able and it suits his purposes. He proposes to develop, regardless of capitalists' conceptions of 'legality,' 'fairness,' 'right,' etc., a greater power than his capitalist enemies have; and then to wrest from them by force the industries they have stolen from him by force and duplicity, and to put an end forever to the wages system. He proposes to bring about the revolution by the general strike."

I shall now read from page 15 of that same book, beginning with about the middle of the page.

"The most widely known form of sabotage is that known as 'putting the machinery on strike.' The syndicalist goes on strike to tie up the industries. If his striking fails to do this, if strikebreakers are secured to take his place, he accomplishes his purpose by 'putting the machinery on strike' through temporarily disabling it. If he is a railroader, he cuts wires, puts cement in switches, signals, etc., runs locomotives into turntable pits, and tries in every possible way to temporarily disorganize the delicately adjusted railroad system. If he is a machinist or factory worker, and hasn't ready access to the machinery, he will hire out as a scab and surreptitiously put emery-dust in the bearings of the machinery, or otherwise disable it. Oftentimes he takes time by the forelock and when going on strike 'puts the machinery on strike' with him by hiding, stealing or destroying some small indispensable machine part which is difficult to replace. As is the case with all direct-action tactics, even conservative workers when on strike naturally practice this form of sabotage—though in a desultory and unorganized manner. This is seen in their common attacks on machines, such as street-cars, automobiles, wagons, and so forth, manned by scabs."

I shall now read from page 16.

Mr. Coghlan: Same book?

Mr. Harris: Yes, this is all from the same book, gentlemen—I beg your pardon, I shall read beginning from the bottom of page 15 instead of page 16, gentlemen, and going over to the middle of [fol. 293] page 16 (reading):

"The French railroad strike of 1910 offers a fine example of this type of sabotage. The strike was lost and 3,300 men were discharged because of it. As a protest against this wholesale discharge, an extensive campaign of passive resistance on the railroad was started. The workers worked, but only for the purpose of confusing the railroad system. In the freight-sheds shipments of glass were laid flat and heavy boxes piled upon them; 'This side up with care' shipments were turned wrong side up; fragile and valuable articles were 'accidentally' broken; perishable goods were buried and 'lost' or ruined by being placed close to other shipments, such as oils and acids that spoiled them. Also a complete confusion was caused by the deliberate mixture and missending of shipments. On the roads engines broke down or died unaccountably; and wires were cut;

engines 'accidentally' jumped into turntable pits; passenger trains' schedules were given up, trains arriving and departing haphazard. But the worst confusion came from the missending of cars. Thousands of cars were hauled all over France in a haphazard manner. For instance, the billing of a car of perishable goods intended for the north of France would be so manipulated that the car would be sent to the south of France, and probably 'lost.' At a place just outside of Paris there were at one time eighteen hundred of such 'lost' cars—many of them loaded with perishable freight consigned to no one knew whom. The most ridiculous 'accidents' and 'mistakes' continually occurred—for this is the humorous form of sabotage. To cite a typical instance: Army officials in one town received notice of the arrival of a carload of dynamite for them. They sent a large detachment of soldiers to convey it through town. On arriving at its destination, the supposed carload of dynamite turned out to be a 'lost' shipment of potatoes."

I shall now read from page 18, the second paragraph:

"The syndicalist is as 'unscrupulous' in his choice of weapons to fight his every-day battle as for his final struggle with capitalism. He allows no considerations of 'legality,' 'religious patriotism,' 'honor,' 'duty,' etc., to stand in the way of his adoption of effective tactics. The only sentiment he knows is loyalty to the interests of [fol. 294] the working class. He is in utter revolt against capitalism in all its phases. His lawless course often lands him in jail, but he is so fired by revolutionary enthusiasm that jail or even death have no terrors for him. He glories in martyrdom, consoling himself with the knowledge that he is a terror to his enemies, and that his movement today, sending chills along the spine of international capitalism, tomorrow will put an end to this monstrosity."

I shall now read from page 19, ladies and gentlemen of the jury, the second paragraph:

"Syndicalism's rejection of political action and opposition to the Socialist movement are due to, first, the superiority of direct action to political action, and second, that the syndicalist and socialist movements are rivals and cannot co-operate."

I shall now read from page 29, ladies and gentlemen of the jury—rather, at page 28, gentlemen, the next to the last paragraph:

"The syndicalist, on the other hand, is strictly an anti-statist. He considers the state a meddling capitalist institution. He resists its tyrannical interference in his affairs as much as possible, and proposes to exclude it from the future society. He is a radical opponent of 'law and order,' as he knows that for his unions to be 'legal' in their tactics would be for them to become impotent. He recognizes no rights of the capitalists to their property, and is going to strip them of it, law or no law."

Reading from page 29, about the second paragraph:

"The syndicalist is a radical anti-patriot. He is a true internationalist, knowing no country. He opposes patriotism because it creates feelings of nationalism among the workers of the various countries and prevents co-operation between them, and also because of the militarism it inevitably breeds. He views all forms of militarism with a deadly hatred because he knows, from bitter experience, that the chief function of modern armies is to break strikes, and that wars of any kind are fatal to the labor movement. He depends solely on his labor unions for protection from foreign and domestic foes alike, and proposes to put an end to war between the nations by having the workers in the belligerent countries go on a [fol. 295] general strike, and thus make it impossible to conduct wars."

Mr. Pemberton: We now move to trike from the record all that was read from this document from which the District Attorney has just been reading, upon the same ground that we objected to it in the first instance, and upon the further ground that it appears to be mere hearsay.

The Court: Motion denied.

Mr. Harris: Call Mr. Cornwall.

D. D. CORNWALL, called on behalf of the People, being first duly sworn, testified as follows:

Direct examination.

Mr. Harris:

Q. Your name is what?

A. D. D. Cornwall.

Q. Mr. Cornwall, where do you live?

A. Bakersfield, Kern County.

Q. What is your business, please?

A. Deputy Sheriff of Kern County.

Q. And were you a deputy sheriff during the year 1918?

A. Yes.

Q. That is, a deputy sheriff of Kern County.

A. Yes.

Q. Do you know where the Rosedale Ranch is in Kern County?

A. I do.

Q. Did you have occasion to go there during the month of—I think it was August, 1918, sir?

A. Yes.

Q. When you got there, what did you find there, please?

Mr. Coghlan: We object upon the ground that no proper foundation has been laid, and that it is not relevant, competent nor material.

Mr. Harris: It is more or less of a preliminary question. We intend to connect it up later. I might state the idea at this time—we will connect it up later as being an act and some of the propaganda, some of the examples of the I. W. W. which the Communist Labor Party so heartily endorsed, and which they say they could not help but subscribe to, and appreciate fully the heroic sacrifices and struggles and valued efforts upon the part of the Industrial Workers of the World. That is our theory of it.

Mr. Coghlan: If the Court please, this record I think does not [fol. 296] contain any such excellent eulogium of the I. W. W. as counsel has indicated: in the first place, it certainly cannot be fastened upon this defendant, that anything of an atrocious character that occurred up there in Kern County at which this deputy sheriff, now sheriff of this county, is justly indignant—it seems to me that is going exceptionally far afield. If counsel wishes to prove his case, as he supposes it to be, that does not seem to attribute anything material to the guilt or innocence of the defendant at bar, any incident involving any member of an organization called the Industrial Workers of the World that occurred anywhere in the State of California, or anywhere in the United States of America or anywhere else under the sun, might be adduced here upon this witness stand and fastened upon this defendant—it seems to me that in common ordinary justice such thing ought not to be allowed, and as to the foundation and connection with this evidence, they have nothing that shows from the records of the I. W. W. organization that there is any connection between this movement, so far as the philosophy of that organization is concerned, and herself; in other words, it is absolutely immaterial, irrelevant and incompetent. I suppose counsel is about to offer proof of some atrocity that occurred in this county, something with which he will probably admit that Miss Whitney has no knowledge, or an incident that perhaps he will admit that she has absolutely no knowledge outside of what she or you or I have read in the newspapers. Yet he brings that into court and attempts to prove her guilt of syndicalism as denounced by the statute, by such evidence as that. It is not—there is no foundation for it, and there is no connection for it in the broad reaches of conspiracy, the law affecting conspiracy—there isn't any avenue, it seems to me, down which counsel can legally travel to connect the defendant at bar with this isolated incident, which he is now attempting to interject into this case and attempting, no doubt, as he thinks proper to do.

Mr. Harris: I do feel it is proper. I do say this, Mr. Coghlan, that I don't think that you will not say that Miss Whitney had no knowledge of this—we do say that she was at the trial of the Sacramento cases in which these points were brought out. But I shall [fol. 297] confine myself, if your Honor desires a little argument upon it, — our point and our contention in this matter. We shall take the Constitution of the Communist Labor Party of the United States of America; first, in that constitution it states: (Reading) "The platform of the Communist Labor Party shall be the supreme declaration of the Party and all stated municipal platforms shall

conform thereto"—showing very clearly that all state and all municipal platforms must conform to that. "Now, then, let me read from the Constitution of the Communist Labor Party of the State of California, having shown that she has attended meetings even in Jan-Communist Labor Party of California." I believe that we have already established, incidentally, beyond all question of doubt, that Miss Whitney was a member of the Communist Labor Party of California, having shown that she has attended meetings even in January of this year, so far as that is concerned, and showing that she was a delegate, and so forth. It says: "No applicant shall be made a party member until he has read the platform, program and constitution. Locals shall require applicants to attend the meeting at which the application is to be presented. If the application is approved by the local meeting, the Party pledge shall be read to the applicant, and he shall be asked if he has read and is willing to abide by the Platform, Program and Constitution of the Party. By an affirmative answer, the presiding officer shall declare the applicant a member of the Communist Labor Party of America. The intent of this paragraph shall be that no person shall be permitted to join the organization who does not thoroughly understand its principles and accept its Platform, Program and Constitution."

I shall now, if your Honor please, read from the Platform and Program of the Communist Labor Party, which an applicant and which a member of the Communist Labor Party must be familiar with, according to the by-laws.

Mr. Coghlan: If the Court please, of course that does not charge this woman—

Mr. Harris (interrupting): I will be through in a minute, Mr. Coghlan. It will be a pleasure to wait for you at that time. Let us go along peacefully in this matter now.

[fol. 298] Mr. Coghlan: All right; go ahead.

Mr. Harris: "The purpose of the Party is to create a unified revolutionary working class movement in America. By the term 'revolutionary industrial unions' is meant the organization of the workers into union by industries with a revolutionary aim and purpose. That is to say, a purpose not merely to defend or strengthen the status of the workers as wage earners, but to gain control of industry.

"In any mention of revolutionary industrial unionism, in this country, there must be recognized of the immense effect upon the American labor movement of the propaganda and example of the Industrial Workers of the World, whose long and valiant struggles and heroic sacrifices in the class war have earned the respect and affection of all workers everywhere. We greet the revolutionary industrial proletariat of America, and pledge them our whole hearted support and cooperation in their struggle against the capitalist class."

Taking the paragraph, if the Court please, which is the paragraph in the Platform and Program of the Communist Labor Party which entitles us to show what our interpretation is of the "long and valiant struggles and heroic sacrifices," and also their article pledging them their whole-hearted support and cooperation. I shall merely, for your Honor's convenience, as well as to point out more clearly

our point, if I may be permitted, reading from a couple of decisions which bear out this theory. I shall read from 169 Northwestern Reporter, if your Honor please, the People against Martin, in the Supreme Court of Minnesota. (Counsel cites above decision in full.)

The Court: Would you like to have the jury excused while you are arguing these law points?

Mr. Coghlan: It does not matter, your Honor. I suppose if this is tedious to the jury, yes; otherwise, we have no objection to their remaining here.

The Court: I just asked both counsel; I thought probably it might be well to excuse them while you are arguing this point of law. I did not do so in the first place because I thought that your argument would not take long, and there would just be a few statements put in. But now we are getting to decisions and other cases, [fol. 299] and I take it that it would be better to have the jury excused.

Ladies and gentlemen of the jury, you may now be excused for ten minutes. You are at this time admonished that it is your duty not to converse among yourselves, or with any other person, upon any subject connected with the trial of this case, or to form or express an opinion thereon until the case is finally submitted to you. Let the officers be sworn.

(Officers sworn to take charge of jury.)

The Court: You may continue.

Mr. Harris: In this case, if your Honor please, citing this case and the case of the State versus Gilbert, 169 Northwestern at page 790, which were argued and submitted together, nearly all the questions raised are common to both cases. (Counsel reads above named decision in full.)

Mr. Harris: I shall now read, if your Honor please, from the Supreme Court Reporter, Debs versus United States, argued January 27 and 28, 1919, Army and Navy Espionage Act, discouraging recruitings. (Hereupon counsel reads above named case in full.)

Mr. Harris: This is an indictment under the Espionage Act. It has been cut down to two counts—originally the third and fourth—

Mr. Coghlan: What page did you say that was?

Mr. Harris: Page 254, Mr. Coghlan. I shall mark it for you, Mr. Coghlan.

Under those two cases, if the Court please, they seem to be very, very similar, and on all fours, as far as that is concerned, in which it becomes very important to show that she, as a member of the Communist Labor Party, endorsed and advocated and so forth, and lent the whole-hearted support to the Industrial Workers of the World and admired their example and propaganda.

Mr. Pemberton: Therefore she should be taxed with everything that some fool has said in some document.

Mr. Harris: The Supreme Court is not a fool.

Mr. Pemberton: I mean the I. W. W. organization.

(Hereupon counsel continued to argue the objection.)

The Court: I will say this: even after all the argument of the [fol. 300] cases particularly before us, that they would be entitled to put in the platform—pardon me—everything that is contained in the platform, when it refers to the propaganda and example, the question is, How are you going to prove that? Don't you think there should be a sort of foundation laid to show what the propaganda is?

Mr. Coghlan: Do you think everybody in that convention ought to be charged with that statement, however innocent?

The Court: The peculiar wording of the first subdivision tends to show what sort of a Party or organization is against the law—that would make it proper for its admission alone.

Mr. Harris: So I may thoroughly understand your Honor's idea, you would prefer—

The Court (interrupting:) The nature and character of the organization.

Mr. Harris: You would prefer to have us bring a witness in, then, so it would be in the logical order and sequence, a witness who has seized certain documents of the I. W. W. organization, which advocates their propaganda.

The Court: To show what their propaganda is, yes.

Mr. Pemberton: If they can connect that up with this defendant.

The Court: That would be the best way, Mr. Harris.

Mr. Harris: We can send for that witness, and he will be here shortly. Or more probably he will be here at two o'clock.

The Court: It is quarter to twelve now, and if that is going to be admitted, we will get that in sooner or later.

Mr. Coghlan: I am so convinced of the soundness of my position, that I would prefer to argue that matter a little bit further, your Honor.

The Court: In the light of those two cases that Mr. Harris has cited, it seems to me that it is very clear about the admission of the testimony. But your objection was to this testimony going in now. That was the thing that concerned me, and which I hesitated about permitting—let the matter go over until two o'clock. Call the jury. Let the matter go over until two o'clock, and we will proceed in an orderly way.

(Jury called.)

[fol. 301] The Court: We will now adjourn until two o'clock. First, I want a stipulation as to the presence of the jury. Will you both stipulate—rather, will counsel stipulate that all the jurors are present?

Mr. Harris: The People will so stipulate.

Mr. Coghlan: The defendant will, also, your Honor.

The Court: We are about to adjourn until two o'clock. You are admonished, ladies and gentlemen of the jury, at this time, that it is your duty not to converse among yourselves or with any other person on any subject connected with the trial of this case, or to form or express an opinion thereon until the case is finally submitted to you.

(At this point a recess was taken until two o'clock p. m.)

Afternoon Session

The Court: People against Whitney.

Mr. Harris: The People will stipulate that the jury is present, your Honor, and waive their being polled.

Mr. Pemberton: The defendant so stipulates, your Honor.

Mr. Harris: I believe Mr. Thompson was to be called, for the purpose of cross examination, at this time.

Mr. Coghlan: The cross examination was waived, of Mr. Thompson.

Mr. Harris: Well, I want to say to you, if you feel that the cross examination was waived, we are perfectly willing to give you the right to cross examine, if Judge Pemberton, through inadvertence and mistake, or in any other way, did waive the cross-examination of Mr. Thompson; we will call him and give you the right to cross examine him at this time, if you so desire.

Mr. Coghlan: I take the position that the testimony of Ed Condon is a perfect refutation of the testimony of the gentleman who has been named. I am content to stand upon that testimony.

[fol. 302] JOHN DIMOND, called for the People, being first duly sworn, testified as follows:

Direct examination.

Mr. Harris:

Q. Your name is what?

A. John Dimond.

Q. Where do you live?

A. Los Angeles County.

Q. Mr. Dimond, what is your occupation, please?

A. My occupation is a laborer.

Q. I didn't hear that.

A. Laborer.

Q. Mr. Dimond, you were associated with the organization known as the Industrial Workers of the World?

A. I was.

Q. Or the I. W. W.?

A. I was.

Q. When?

A. From the years 1905 until the beginning of 1919.

Q. Did you occupy any official position in connection with the I. W. W. organization?

A. I was secretary once.

Q. You were secretary once?

A. At Fresno, California.

Q. At Fresno?

A. Yes.

Q. When, please?

A. During March and April, 1918.

Q. As such, did you ever have the handling of the pamphlets, books and circulars of the I. W. W.?

A. I did.

Q. I show you the proceedings of the Industrial Workers of the World at the tenth convention, 1916, and ask you to tell us what that is, please, Mr. Dimond, if you know.

Mr. Cochlan: We object to that, if the Court please, on the same grounds heretofore interposed, and upon the further ground that no proper foundation has been laid for it—as to the evidence that is now attempted to be introduced, I don't want to be hypertech- nical; I want counsel to have his opportunity of presenting it lucidly enough, but I would like to have an objection go to each of those articles. I apprehend, by reason of your Honor's ruling, that you will rule adversely to me.

The Court: It may be overruled, and the same objection as heretofore entered to the admission in evidence of other documents that were presented at the time of Mr. Wood being on the stand, is now made, I understand, by the defendant. Mr. Coghlan, is that right?

Mr. Coghlan: Yes, your Honor.

The Court: Very well; let the objection be overruled.

[fol. 303] Mr. Harris:

Q. What is that?

A. That is the official publication of the Tenth Convention of the Industrial Workers of the World at Chicago.

Mr. Harris: I ask at this time, your Honor, that it be introduced in evidence.

Mr. Coghlan: Same objection.

The Court: The objection may be entered, and it may be overruled, and the document admitted in evidence.

Mr. Harris:

Q. I will show you a book, entitled "Songs", and ask you if you know what that is—subject to your same objection?

A. This is the I. W. W. song book; it is an official publication.

Mr. Harris: I ask, if your Honor please, that that be introduced in evidence, and to take the proper number.

Mr. Coghlan: Same objection.

The Court: Same objection entered, and let it be overruled, and the document admitted in evidence.

Mr. Harris:

Q. I show you this book, entitled "Sabotage", and ask you if you can tell us what that is, please?

A. This is a book on "Sabotage", by Walker C. Smith. It was — an official publication of the I. W. W. but was circulated by them.

Q. It was circulated by the I. W. W.?

A. Yes.

Mr. Harris: I ask at this time that that be introduced in evidence if your Honor please.

The Court: It may be overruled, it may be admitted.

Mr. Harris:

Q. I will show you this one, entitled "How to Overcome the High Cost of Living", and ask you what that is, please, Mr. Dimond?

A. This is an official pamphlet of the I. W. W.

Q. It is what?

A. This is an official pamphlet of the I. W. W.

Q. The I. W. W. Organization?

A. Yes.

Mr. Harris: If the Court please, I ask at this time that it be introduced in evidence.

The Court: It may be admitted.

Mr. Coghlan: Same objection.

The Court: Subject to the same objection.

Mr. Harris:

Q. I will show you this book, entitled "Sabotage" by Emile Pouget. [fol. 304] A. This is not an official publication of the I. W. W., but it was circulated by them, however.

Q. It was circulated by the I. W. W.?

A. Yes.

The Court: By the I. W. W. organization?

A. Yes, but it is not official.

The Court: Very well, the objection may be considered as made and overruled, and the pamphlet or document admitted.

Mr. Coghlan: Yes, your Honor.

The Court: When you stated that in reference to another document there that has been admitted in evidence, that it was not an official publication of the I. W. W., but that it was circulated by them, you mean by the I. W. W. organization?

A. Yes, as propaganda.

Mr. Coghlan:

Q. And other organizations also, Mr. Dimond?

A. Yes, and other organizations also, Mr. Coghlan, yes.

Mr. Harris:

Q. I will show you this one, entitled "I. W. W. Songs" and ask you if you can tell us what that is, please?

A. This is an official I. W. W. song book.

Mr. Harris: I ask, if the Court please, that it be introduced in evidence.

The Court: Same objection, Mr. Coghlan?

Mr. Coghlan: Same objection.

The Court: Very well, let the same objection be noted, and it may be overruled.

Mr. Coghlan: The only objection is that some of the meter is not good in those songs.

Mr. Harris: I will agree with you.

Q. I will show you this book, entitled "Sabotage", by Elizabeth Gurley Flynn, and ask you to tell us what that is, please.

A. This is an official document of the I. W. W., "Sabotage", by Elizabeth Gurley Flynn.

Mr. Harris: I ask, if your Honor please, at this time that that be introduced in evidence, and to take the appropriate exhibit number.

The Court: What is the answer there, Mr. Reporter?

(The Reporter reads question and answer.)

[fol.305] The Court: It may be admitted after overruled the objection before made to this, as well as the others.

Mr. Harris: I think that is all of this witness for the time being, if the Court please. We are producing this witness pursuant to the suggestion that your Honor made this morning, and of course, which was a very good suggestion, concerning the platform and program, and so forth, as laid down by the I. W. W. I might ask, however, with your Honor's permission, another question.

Q. Mr. Dimond, you have said that "Sabotage", by Elizabeth Gurley Flynn, was one of the I. W. W. publications?

A. Yes, I have.

Q. What sabotage was advocated by the I. W. W. organization?

Mr. Coghlan: We object to that, if the Court please, as not relevant, competent nor material, and on the ground that no proper foundation has been laid.

The Court: What other, did you say?

Mr. Harris: What sabotage was advocated by them?

The Court: It may be overruled, and you may answer the question.

A. I don't quite understand what you want, Mr. Harris—do you mean in what forms was the sabotage?

Mr. Harris:

Q. In what forms, yes.

Mr. Pemberton: We make the further objection on the ground that it calls for the conclusion of the witness.

The Court: It may be overruled, and you may answer.

A. Sabotage was advocated in several different forms.

Mr. Coghlan: By the I. W. W. in its meetings?

A. Well, not in its meetings.

Mr. Harris: We are examining this witness. We are perfectly willing to allow you to cross examine him when the time comes.

Mr. Coghlan: I crave the right to examine this witness for just one moment—by the I. W. W. in its meetings?

Mr. Harris: Just a second—I do not know that Mr. Coghlan has the right to cross examine this witness at this time.

Mr. Coghlan: I think that I have.

The Court: No, not at this time. I don't think you have. If it was a matter of the foundation for the introduction of some evidence, you would. But that is not the purpose here, consequently on a proposition of this kind it would be properly taken up I think, when the time for cross examination came.

Mr. Coghlan: I haven't any doubt about the correctness of my stand or I would not have stood up to make it; but if your Honor rules the other way, that is entirely satisfactory and I shall sit down.

A. There was one form of sabotage which was termed "open-mouthed sabotage", that is, that persons employed in certain industries would tell the truth as to what actually transpired in these industries. Then, of course, there was another form of sabotage that was destructive to property, and which consisted of the advocacy of sowing Johnson grass or Bermuda grass, or other destructive grasses, in orchards or vineyards, and advocated the destruction of machinery or the use of emery-dust, and advocated the destruction of fruit trees date of the first trial of the I. W. W.'s in Sacramento, about that would about cover it.

Q. Anything regarding burning?

A. That is something that never came up in a meeting, or that never was spoken of from a platform, to my knowledge.

Q. It was never spoken of from the platform, you mean?

A. No sir.

Q. That is, to your knowledge?

A. No sir.

Mr. Harris: That is all.

Cross-examination.

Mr. Coghlan:

Q. You became a member of this organization of the I. W. W., Mr. Dimond, in 1905?

A. Yes, I came in with the Western Federal of Miners.

Q. When did you become an informer upon them, Mr. Dimond?

A. I think—I could not give you the exact date—if you know the date of the first trial of the I. W. W.'s in Sacramento, about that time.

Q. You mean in 1917 and 1918?

A. No, it was in 1918, Mr. Coghlan.

Q. So that, between 1905 and 1918, you were practicing these various acts of sabotage that you have described to us?

A. No, no.

Q. You were not?

A. No, sir.

Q. You did not even know about them, did you, Mr. Dimond, for a while?

[fol. 307] A. Well, no, not for quite a time, I did not.

Q. I mean to say, the rank and file of the people upon who you subsequently informed did not know about these acts of sabotage that you have spoken to the jury about?

A. They did not know about it before they were performed. Sabotage did not come into effect in 1905. It did not come into effect until somewhere around the time of the Ford and Suhr trouble.

Q. 19—what year was that—1915?

A. No, 1913, I believe.

Q. You mean the murder trial?

A. Yes.

Q. Ford and Suhr were charged with murder?

A. Yes.

Q. Previously to that time you heard nothing of sabotage?

A. I had heard a little about it before that time, but I did not understand just exactly what it was—probably a year before that.

Q. You were a regular member of the organization?

A. Yes, ho, yes.

Q. Up to that time; and you had not practiced any acts of sabotage?

A. No, sir.

Q. No?

A. No, sir.

Q. And you never saw any paper or any resolution advocating sabotage up to that time. Is that correct?

A. No, I don't believe that I had.

Q. As a matter of fact, sabotage was practiced only by persons that really were not acting officially. That is true, isn't it, Mr. Dimond?

A. Well, I cannot say as to that.

Q. You can't say as to that; you don't know whether that is true, or not?

A. I know that Lambert, who was the official secretary at Sacramento, and Waye, who was secretary of Stockton, both—

Q. (Interrupting.) Practiced it?

A. Yes.

Q. But you don't know that anybody sanctioned that thing in that organization of humble membership, do you?

A. You mean that any resolution was ever passed?

Q. That is what I mean, that any general understanding was had upon that subject?

A. Why, yes; in the general convention in Chicago they did pass a resolution.

Q. What was that resolution; do you remember the wording of it?

A. No, sir. I believe I could get it for you, though, Mr. Coghlan.

[fol. 308] Q. I should like it, if you can get it, while we are going on with the trial of this case.

A. I will try to look it up for you. I think I can get it for you.

Q. You say that has to do with sabotage, as you have described it?

A. That action praised sabotage.

Q. You mean by "that action," action destructive of property and against law?

A. Yes. Let me have that tenth Convention book a minute. I believe I can find it for Mr. Coghlan right now. I think the Lambert resolution had to do with that, if I am not mistaken. (Examines document.) There it is.

Q. This is not a resolution, if you will observe. I don't want to be misunderstood, but it is a report by Lambert, a report by Lambert.

A. Under the executive—it is the same thing.

Q. Don't say it is the same thing, because it is not the same thing.

A. All right, it is not, then.

Q. It is a report by C. L. Lambert, as you will observe.

A. And C. L. Lambert was a member of the Executive Board of the I. W. W.

Q. Where?

A. In Chicago.

Q. In Chicago?

A. Yes, he was.

Q. That is merely a report of a committee, isn't it?

A. That is merely a report of a secretary.

Q. Now, you don't want to be put in the position of defending your organization that you are now talking against?

A. I am not at all.

Q. I simply want the truth.

A. You are getting it.

Q. Yes, I shall insist on it, if I don't get it. This is merely a report by C. L. Lambert, as secretary; and is not a resolution. That is correct, isn't it?

A. What?

Q. Read it at your leisure, because I am not defending the I. W. W.

A. No. This is resolution No. 109.

Q. It is?

A. No. 109.

Q. Where you pointed it out to me?

A. Yes, right above it, you see. There is the report following.

Q. This is the report of the Wheatland Hop Pickers' Defense Committee.

A. Exactly.

[fol. 309] Q. And Resolution 109, is that what you call it?

A. Resolution 109.

Q. 109?

A. Yes.

Q. (Reading:) "Motion made and seconded that we pay St. John this amount. Discussion by Prashner and Sinclair."

Has that got any resolution to it?

A. No, sir, that has no resolution to that at all.

Q. All right, we will read that.

A. It is resolution No. 109.

Q. (Reading:)

"To the Delegates of the Tenth Convention of the I. W. W.

"FELLOW WORKERS: In submitting the financial report of the Wheatland Hop Pickers' Defense Committee, I believe that it would not be out of place to give some account of the efforts made to effect the release of our imprisoned Fellow Workers. They were tried and sentenced by the Superior Court of Yuba County, State of California, to life imprisonment for their activities in forcing better working and living conditions in the Agricultural Industry of California. An appeal was taken to the Third District Appellate Court and the lower court was upheld. The case was then carried to the Supreme Court of the State for a rehearing, but a rehearing of the case was refused. Agitation and action on the job was continually carried on by the members of the I. W. W. and the State of California has already paid eight million dollars per year (the State's own figure) since 1913 for holding Ford and Suhr in prison. Early in 1915 the case came up on a petition for pardon before the Governor. The matter, as far as Governor Johnson was concerned, lay dormant for over nine months. He then made the statement that he would not consider the cases of Ford and Suhr further until sabotage and threats of sabotage were stopped. It is not generally known that more than forty members of the I. W. W. languish in prisons of California, serving sentences ranging from one to six years, for their activities, nor that two of our members have been killed in the fight with the employing class of California for the freedom of Ford and Suhr. These things have not dampened our spirits in the least. Nor have they altered our determination to keep banging away at them until either Ford and Suhr are free, or that we are all in prison with them. We do not want any money [fol. 310] from the General Organization; we can get along without that, but what we do want is 'Men, and lots of men, who are willing to help us battle the employing class of California by any and all means at our command, for the freedom of Richard Ford and Herman Suhr.'

Yours for the O. B. U., C. L. Lambert, Secretary."

Q. That is what you characterize as the resolution that has reference to sabotage, is that correct?

A. That is the resolution, yes.

Q. You knew, generally speaking, and knew pretty well the membership of that organization at that time, did you not?

A. I did, yes.

Q. And subsequently?

A. Yes.

Q. And you know that this lady never held a card in your organization, don't you?

A. I do, yes.

Q. And you know she did not?

A. I know she did not, yes.

Q. And that she had nothing to do with this resolution or with any other resolution of that kind with relation—whether it is relative to sabotage, or not—but with relation, either to sabotage or any other matter presented to your general convention, as indicated by this book. Is that correct?

A. I know she had nothing to do with any of the proceedings in the Tenth Convention; yes.

Mr. Coghlan: That is all.

Mr. Harris: That is all for the time being.

Mr. Harris: If your Honor please, now, then, I presume to follow the orderly course would be to read certain portions of these exhibits which we contend show very clearly the propaganda of the I. W. W. organization.

Mr. Coghlan: If the Court please, with relation to these papers, if we could save time and labor on the part of the jury, I should like to do it, I, particularly. If they might be deemed to have been read in their entirety, possibly that would serve the same purpose to counsel on both sides; if that is agreeable to counsel for the prosecution.

Mr. Harris: I feel this way, your Honor; that we might defer reading them until such time as Mr. Calkins, who is really in [fol. 311] charge of this case, and whom I am assisting, returned, so that he might select what portions he might read, if any. I would much appreciate it, and then we could proceed with the testimony that we started in with.

Mr. Coghlan: I understand that, and I would be perfectly willing that the Court defer any ruling in that matter until his appearance here in Court.

Mr. Harris: Let us present the matter that I am not presenting, to him when he comes to Court. Then we intend to come now to the testimony that we started this morning; namely, that of Deputy Sheriff Cornwall, and start to prove a number of specific acts by members of the I. W. W. organization. That is our intention, and I presume it will be subject to the same objection which has been heretofore urged.

Mr. Coghlan: Yes. Of course, we will object, we cannot help it—all we can do is object.

Mr. Harris: Very well, then, and we will just leave out that portion of reading those things which we contend show very clearly the propaganda and so forth. In other words, your Honor has admitted it under our promise to later connect it up as regards the propaganda and example set forth by the I. W. W. organization as you have suggested this morning.

The Court: That is all the literature you are going to introduce at this time?

Mr. Harris: At this time, yes, your Honor. We contend that that sets out very clearly the propaganda and the example and program, as set forth by the I. W. W. organization, and we will agree to connect it up later at a later date, then, on Mr. Coghlan's suggestion that we do not read this at this time.

The Court: The platform and program of the Communist Labor Party—so far as the propaganda and example of the I. W. W. are concerned, what are you going to do about it?

Mr. Harris: We are going to begin to show some of the examples of the I. W. W. activities, namely, fires. That is our intention at this time.

The Court: You are going to defer the matter, then?

[fol. 312] Mr. Coghlan: Let us defer the reading of them. Your Honor knows generally what the contents of those papers are, and let us stipulate that they have been read.

The Court: All right, if counsel desires.

Mr. Coghlan: I do not want to take away from your associate any privilege or the right to renew his request to read from them at all. That is not what I mean. But for the purpose of this, to this extent, we will assist you in supplying your foundation.

Mr. Harris: Thank you.

[fol. 313]

Wednesday, February 11, 1920.

The Court: People against Whitney. Will counsel stipulate that all the jurors are present?

Mr. Coghlan: Yes, your Honor, we do.

Mr. Harris: I don't see Miss Whitney here. So far as I know I have not seen her this morning.

The Court: Before any stipulation is made, then, we will wait a moment.

(10:15 a. m. defendant appears.)

Mr. Pemberton: Miss Whitney says she was quite ill this morning, and for that reason unable to get here on time, your Honor.

Mr. Harris: We will now stipulate that the jurors are all present, if your Honor please, at this time.

Mr. Coghlan: We do, your Honor.

Mr. Harris: At this time, if your Honor please, we will ask permission to read certain extracts from some of the exhibits that were introduced in evidence yesterday.

The Court: Let me ask—I would rather say to counsel that if there is anything about the ventilation of the court-room that is, if you find any draughts here whatsoever, just kindly call the Court's attention to it and we will try, through the assistance of the bailiff and other officers of the court, to make it as comfortable and as healthful as possible. Do you feel well enough to go on with the case, Miss Whitney?

Mr. Coghlan: Yes, your Honor.

Mr. Harris: At this time, if your Honor please, and gentlemen, I shall read from the book which was introduced in evidence as "People's Exhibit No. 24," and entitled "The Revolutionary I. W. W.," by Grover H. Perry, reading from page 15:

"The Industrial Workers of the World are laying the foundation of a new government. This government will have for its legislative halls the mills, the workshops and factories. Its legislators will

"be the men in the mills, shops and factories. Its legislative [fol. 314] "enactments will be those pertaining to the welfare of the workers."

"These things are to be. No force can stop them. Armies will be of no avail. Capitalist governments may issue their mandates in vain. The power of the workers—industrially organized—is the only power on earth worth considering—once they realize that power. Classes will disappear, and in their place will be only useful members of society—the workers."

I shall now read, gentlemen, from "People's Exhibit 25" in this case, which is entitled "The I. W. W. Its History, Structure and Methods," by Vincent St. John. I shall read from page 17 first, reading from the first two paragraphs:

"As a revolutionary organization the Industrial Workers of the World aim to use any and all tactics that will get the results sought with the least expenditure of time and energy. The tactics used are determined solely by the power of the organization to make good in their use. The question of 'right' and 'wrong' does not concern us."

"No terms made with an employer are final. All peace, so long as the wage system lasts, is but an armed truce. At any favorable opportunity the struggle for more control of industry is renewed."

Reading from page 18, the first five paragraphs:

"Failing to force concessions from the employers by the strike, work is resumed and 'sabotage' is used to force the employers to concede the demands of the workers."

"The great progress made in machine production results in an ever increasing army of unemployed. To counteract this the Industrial Workers of the World aim to establish the shorter work day, and to slow up the working pace, thus compelling the employment of more and more workers."

"To facilitate the work of organization, large initiation fees and dues are prohibited by the I. W. W."

"During strikes the works are closely picketed and every effort made to keep the employers from getting workers into the shops. All supplies are cut off from strike bound shops. All shipments are refused or missent, delayed and lost if possible. Strike breakers are also isolated to the full extent of the power of the organization. [fol. 315] "Interference by the government is resented by open violation of the government's orders, going to jail en masse, causing expense to the taxpayers—which is but another name for the employing class."

"In short, the I. W. W. advocates the use of militant 'direct action' tactics to the full extent of our power to make good."

I shall now read, gentlemen, from "People's Exhibit No. 26," which is entitled "The Advancing Proletariat." I shall now read from page 21 first, the first paragraph and also the second paragraph:

"Two facts stand out prominently in an examination of modern society: 1st, the proletariat is the subject class, and 2nd, the special function of the State is to keep the proletariat in subjection. Therefore, any organization of the proletariat as a class must at once be considered a menace to the privileged classes and be declared illegal. All the activities of the proletariat furthering its program for a new society must necessarily be revolutionary and be beyond the 'Law.' Therefore, the Socialist Politician's 'legal revolution' idea is regarded as absurd, by the proletariat; and since the proletariat realizes that all its forces must be closely co-ordinated and drilled in production and cooperation in order to function in the new society, the idea that the whole economic structure of this present society can be changed by going to the polls once every two or four years is especially absurd.

"The proletariat makes no appeal to any but the wage earning class, though it realizes that the growth of the Social Consciousness among all classes must bring thousands to its standard, whose immediate personal interests would be conserved by an opposite course. It realizes how great a task it is to persuade men against their material interests, and how small the change is to secure a majority at the polls—a majority, helpless in its strength because undisciplined in co-operation and composed of potentially discordant elements. But more it realizes, that the proletariat, operating the machinery of production and really in possession of the wealth of the world, is in a position to dictate the terms of life to all society, if it merely secures the consent and cooperation of the members of its own class. It proposes that the ballot box shall repose [fol. 316] "first in the Union hall and then in the shop; and one needs only to function in industry to be a voter there. The recently landed immigrant, who has a 'job,' is equal to the descendant of the Pilgrim Fathers, who also works for bread.

"The future society comes only at the desire and with the consent of the proletariat, for it is evidently the only class able to safeguard humanity by means of a new society; and the revolution can properly occur, only after the proletariat has had sufficient training in voluntary co-operation and self-government to be able to demonstrate its ability to successfully continue production and handle distribution so that all may be fed. Voting en masse at the polls is no evidence whatsoever of such ability, and to teach this class that its way to freedom lies primarily through the ballot box is a most miserable miseducation and paves the way to the most desperate catastrophe that humanity could ever suffer."

Reading from page 23, the first paragraph:

"In a class society, the powers of the government are derived from the economic power of the dominant class, and, for that reason, the prime necessity of the proletariat, in its struggle, is to develop its economic power, for it is really opposed only by economic power. Organization on the economic field, at the point of production, and contending for the product of the machines is the only

"method of developing economic power for the proletariat; and participation in purely political propaganda and campaigns is a criminal waste of time and energy. In the field of politics, the program of the proletariat should be "pressure, rather than participation;" "a program heretofore ably pursued by the Plutocrats."

I shall now read, ladies and gentlemen, from the book that Mr. Coghlan so ably said lacks both meter and rhyme, which is entitled "Joe Hill Memorial Edition" of "I. W. W. Songs," which is the I. W. W. songs, and I shall read, permit me to say that I shall not attempt to sing any of these songs, I shall just read them as best I can. The first one that I shall read will be from page 23, Mr. Coghlan, which is entitled "Christians at War, By John F. Kendrick," which carries the tune of "Onward Christian Soldiers."

[fol. 317]

"Onward, Christian Soldiers! Duty's way is plain:
Slay your Christian neighbors, or by them be slain.
Pulpiteers are spouting effervescent swill,
God above is calling you to rob and rape and kill,
All your acts are sanctified by the Lamb on high;
If you love the Holy Ghost, go murder, pray and die.

Onward Christian soldiers, rip and tear and smite
Let the gentle Jesus, bless your dynamite.
Splinter skulls with shrapnel, fertilize the sod;
Folks who do not speak your tongue, deserve the curse of God.
Smash the doors of every home, pretty maidens seize;
Use your might and sacred right to treat them as you please.

Onward, Christian soldiers! Eat and drink your fill;
Rob with bloody fingers, Christ O. K.'s the bill.
Steal the farmer's savings, take their grain and meat;
Even though the children starve, the Savior's bums must eat.
Burn the peasant's cottages, orphans leave bereft;
In Jehovah's holy name, wreak ruin right and left.

Onward, Christian soldiers! Drench the land with gore;
Mercy is a weakness all the gods abhor.
Bayonet the babies, jab the mothers, too;
Hoist the cross of Calvary to hallow all you do.
File your bullets' noses flat, poison every well;
God decrees your enemies must all go plumb to hell.

Onward, Christian soldiers! Blighting all you meet,
Trampling human freedom under pious feet.
Praise the Lord whose dollar sign dupes his favored race!
Make the foreign trash respect your bullion brand of grace.
Trust in mock salvation, serve as pirates' tools;
History will say to you: "That pack of G— d— fools."

I shall now read from page 24 of that same book, gentlemen, which is entitled "Workers of the World, By Connell";

"Stand up, ye toilers, why crouch ye like cravens?

Why clutch an existence of insult and want?

Why stand to be plucked by an army of ravens,

Or hoodwink'd forever by twaddle and cant?

Think of the wrongs ye bear,

Think on the rags ye wear,

Think on the insults endur'd from your birth;

Toiling in snow and rain,

Rearing up heaps of grain,

All for the tyrants who grind you to earth.

Your brains are as keen as the brains of your masters,

In swiftness and strength ye surpass them by far;

Ye've brave hearts to teach you to laugh at disasters,

Ye vastly outnumber your tyrants in war.

Why, then, like cowards stand,

Using not brain or hand,

Thankful like dogs when they throw you a bone?

What right have they to take

Things that ye toil to make?

Know ye not, workers, that all is your own?

Rise in your might, brothers, bear it no longer;

Assemble in masses throughout the whole land;

Show these incapables who are the stronger

When workers and idlers confronted shall stand.

[fol. 318] Thro' Castle, Court and Hall,

Over their acres all,

Onwards we'll press like waves of the sea,

Claiming the wealth we've made,

Ending the spoiler's trade;

Labor shall triumph and mankind be free."

I shall now read from page 22, gentlemen, entitled, "Stand up, Ye Workers," by Ethel Comer. Air is "Stand up for Jesus."

"Stand up! Stand up! Ye workers;

Stand up in all your might.

Unite beneath our banner,

For Liberty and right.

From victory unto victory

This arm sure will go,

To win the world for labor

And vanquish every foe.

Stand up! Stand up! Ye workers;
 Stand up in every land.
 Unite, and fight for freedom,
 In One Big Union grand.
 Put on the workers' armor,
 Which is the card of Red,
 Then all the greedy tyrants
 Will have to earn their bread.

Arouse! Arouse! Ye toilers,
 The strife will not be long.
 This day the noise of battle,
 The next the victor's song.
 All ye that slave for wages,
 Stand up and break your chain:
 Unite in One Big Union—
 You've got a world to gain."

I shall read from page 14 next, which is entitled "The Preacher and the Slave," by Joe Hill. The tune is "Sweet Bye and Bye."

"Long-haired preachers come out every night,
 Try to tell you what's wrong and what's right;
 And when asked how 'bout something to eat
 They will answer with voices so sweet:

You will eat, bye and bye,
 In that glorious land above the sky;
 Work and pray, live on hay,
 You'll get pie in the sky when you die.

And the starvation army they pray,
 And they sing and they clap and they pray,
 Till they get all your coin on the drum,
 Then they'll tell you when you're on the bum:

Holy Rollers and jumpers come out,
 And they holler, they jump and they shout.
 'Give your money to Jesus, they say,
 'He will cure all diseases today.'

If you fight hard for children and wife—
 Try to get something good in this life—
 You're a sinner and bad man, they tell,
 When you die you sure go to hell.

[fol. 319] "Workingmen of all countries, unite,
 Side by side we for freedom will fight:
 When the world and its wealth we have gained
 To the grafters we'll sing this refrain:

You will eat, bye and bye,
 When you've learned how to cook and to fry
 Chop some wood, 'twill do you good,
 And you will eat in the sweet bye and bye."

I shall read from the pieces on page 17, entitled, "Ta-Ra-Ra-Boom De-ay," By Joe Hill.

"I had a job once threshing wheat, worked sixteen hours with hands and feet.

And when the moon was shining bright, they kept me working all the night.

One moonlight night, I hate to tell, I 'accidentally' slipped and fell.

My pitchfork went right in between some cog wheels on that thresh machine.

Chorus

Ta-ra-ra-boom-d-ay!

It made a noise that way,

And wheels and bolts and hay,

Went flying every way.

That stingy rube said, 'Well,'

A thousand gone to hell,'

But I did sleep that night,

I needed it all right.

Next day that stingy rube did say, 'I'll bring my eggs to town today; You grease my wagon up, you mutt, and don't forget to screw the nut.'

I greased his wagon all right, but I plumb forgot to screw the nut, And when he started on that trip, the wheel slipped off and broke his hip.

Second Chorus

Ta-ra-ra-boom-d-ay!

It made a noise that way;

That rube was sure a sight,

And mad enough to fight;

His whiskers and his legs

Were full of scrambled eggs:

I told him 'That's too bad—

I'm feeling very sad.'

And then that farmer said, 'You turk! I bet you are an I-Won't Work.'

He paid me off right there, By Gum! So I went home and told my chum,

Next day when threshing did commence, my chum was Johnny on the fence;

And 'pon my word, that awkward kid, he dropped his pitchfork, like I did.

Third Chorus

Ta-ra-ra-boom-de-ay!

It made a noise that way,

And part of that machine

Hit Reuben on the bean.

[fol. 320] He cried, 'Oh me, oh my;

I nearly lost my eye'.

My partner said, 'You're right—

It's bedtime now, good night.'

And still that rube was pretty wise, these things did open up his eyes.

He said, 'There must be something wrong; I think I work my men too long.'

He cut the hours and raised the pay, gave ham and eggs for every day.

Now gets his men from union halls, and has no 'accidents' at all.

Fourth Chorus

Ta-ra-ra-boom-de-ay!

That rube is feeling gay;

He learned his lesson quick,

Just through a simple trick,

For fixing rotten jobs

And fixing greedy slobs,

This is the only way,

Ta-ra-ra-boom-de-ay!"

I shall read now from page 32, gentlemen, Casey Jones—"The Union Scab," By Joe Hill.

"The Workers on the S. P. line to strike sent out a call;
But Casey Jones, the engineer, he couldn't strike at all
His boiler it was leaking, and its drivers on the bum,
And his engine and its bearings, they were all out of plumb.

Chorus

Casey Jones kept his junk pile running;

Casey Jones was working double time;

Casey Jones, good and faithful on the S. P. line.

The Workers said to Casey: 'Won't you help us win this strike?'
But Casey said: 'Let me alone, you'd better take a hike.'
Then some one put a bunch of railroad ties across the track.
And Casey hit the river with an awful crack.

Casey Jones hit the river bottom;

Casey Jones broke his blooming spine,

Casey Jones was an Angeleno,

He took a trip to heaven on the S. P. line.

When Casey Jones got up to heaven to the Pearly Gate,
He said 'I'm Casey Jones, the guy that pulled the S. P. freight.'
'You're just the man,' said Peter; 'our musicians went on strike;
You can get a job a-scabbing any time you like.'

Casey Jones got a job in heaven;
Casey Jones was doing mighty fine;
Casey Jones was scabbing on the angels,
Just like he did to workers on the S. P. line.

[fol. 321] The angels got together, and they said it wasn't fair,
For Casey Jones to go around a-scabbing everywhere.
The Angels' Union No. 23, they sure were there,
And they promptly fired Casey down the Golden Stair.

Casey Jones went to Hell a-flying.
'Casey Jones,' the Devil said, 'Oh, fine;
Casey Jones, get busy shoveling sulphur;
That's what you get for scabbing on the S. P. Line'."

I shall now read from page 46, gentlemen, which is entitled
"Paint 'er Red," by Ralph H. Chaplin. The tune is "Marching
Through Georgia."

"Come with us, you workingmen, and join the rebel band;
Come, you discontented ones, and give a helping hand,
We march against the parasite to drive him from the land.
With One Big Industrial Union!

Chorus

Hurrah! hurrah! we're going to paint 'er red!
Hurrah! hurrah! the way is clear ahead—
We're gaining shop democracy and liberty and bread
With One Big Industrial Union!

In factory and field and mine we gather in our might,
We're on the job and know the way to win the hardest fight,
For the beacon that shall guide us out of darkness into light,
Is One Big Industrial Union!

Come on, you fellows, get in line; we'll fill the boss with fears;
Red's the color of our flag, it's stained with blood and tears—
We'll flout it in his ugly mug and ring our loudest cheers
For One Big Industrial Union!

'Slaves' they call us 'working plugs,' inferior by birth,
But when we hit their pocketbooks we'll spoil their smiles of mirth—
We'll stop their dirty dividends and drive them from the earth
With One Big Industrial Union!

We hate their rotten system more than any mortals do,
 Our aim is not to patch it up, but build it all anew,
 And what we'll have for government, when finally we're through,
 Is One Big Industrial Union!"

Reading from page 48, "The Workers' Battle Cry for Freedom" by George G. Allen. The air is "Shouting the Battle Cry of Freedom."

[fol. 332] "Yes, we'll rally from the mines, boys, and fields of waving grain,
 To shout the Workers' battle cry for freedom.
 And we'll rally from the workshops where millions have been slain,
 To shout the Workers' battle cry for Freedom."

Chorus

One Union forever, Hurrah, boys, Hurrah!
 Down with Tradition! Let's raise the Wooden Claw.
 Then we'll rally from the sweat shops, from brush to Poor Man's Lane,
 To shout the Workers' battle cry for Freedom.

We shall rally to the call, boys, on every sea and shore,
 To shout the Workers' battle cry for freedom.
 We shall stand with folded arms and for Masters slave no more,
 And shout the Workers' battle cry for freedom.

Chorus

When the world is standing still and the Master cries for peace,
 Let's shout the Workers' battle cry for freedom,
 When he dons the overalls then the working class will cease,
 To shout the Workers' battle cry for freedom.

Second Chorus

One Union forever! Hurrah, boys, Hurrah!
 Down with the Gunmen! Let's raise the Wooden Paw.
 When we've gathered in the Camp, in the Jungle, on the Train,
 Let's shout the Workers' battle cry for freedom."

I shall read from page 51, which is entitled "Liberty Forever," and the air is the "Anvil Chorus."

"We broke the yoke of a pitiless class,
 And we burst all asunder our bonds and chains;
 Our organization will win when it strikes,
 And no more shall a king or a crown remain—
 United fast are we with bonds that naught can sever;
 Long, loud and clear and far our battle cry rings ever—
 Liberty for aye and aye!
 Liberty forever!
 Liberty forever!
 Shall be our battle cry.

If Freedom's road seems rough and hard,
 And strewn with rocks and thorns,
 Then put your wooden shoes on, pard,
 And you won't hurt your corns.
 To organize and teach, no doubt,
 Is very good,—that's true,
 But still we can't succeed without
 The Good Old Wooden Shoe."

[fol. 333] I shall read, gentlemen, from the book entitled "People's Exhibit No. 27," which is "The General Strike," by William D. Haywood. I shall read from—beginning with the first paragraph on page 15:

"Question (by a woman comrade). Isn't a strike, theoretically, a situation where the workingmen lay down their tools and the capitalist class sits and waits, and they both say 'Well, what are you going to do about it?' And if they go beyond that, and go outside the law, is it any longer a strike? Isn't it a revolution?"

"Answer. A strike is an incipient revolution. Many large revolutions have grown out of a small strike.

"Question. Well, I heartily believe in the general strike if it is a first step towards the revolution, and I believe in what you intimate, that the workers are damn fools if they don't take what they want, when they can't get it any other way.

"Answer. That is a better speech than I can make. If I didn't think that the general strike was leading on to the great revolution which will emancipate the working class, I wouldn't be here. I am with you because I believe that in this little meeting there is a nucleus here that will carry on the work and propagate the seed that will grow into the great revolution that will overthrow the capitalist class."

I shall also read from the same book, beginning with the first paragraph on page 6, and ending with the fourth paragraph on page 7:

"And in Wales it was my good fortune to be there, not to theorize but to take part in the general strike among the coal miners. Previous to my coming, or in previous strikes, the Welsh miners had been in the habit of quitting work, carrying out their tools, permitting the mine manager to run the pumps, allowing the engine winders to remain at work, carrying food down to the horses, keeping the mines in good shape, while the miners themselves were marching from place to place singing their old-time songs, gathering on the meeting grounds of the ancient Druids and listening to the speeches of the labor leaders; starving for weeks contentedly, and on all occasions acting most peaceably; going back to work when they were compelled to by starvation. But this last strike [fol. 324] was an entirely different one. It was like the shoemakers' strike in Brooklyn. Some new methods had been injected into the strike. I had spoken there on a number of occasions previous to the strike being inaugurated, and I told them of the methods

"that we adopted in the West, where every man employed in and
 "around the mine belongs to the same organization; where, when
 "we went on strike, the mine closed down. They thought that that
 "was a very excellent system. So the strike was declared. They at
 "once notified the engine winders, who had a separate contract with
 "the mine owners, that they would not be allowed to work. The
 "engine winders passed a resolution saying that they would not
 "work. The haulers took the same position. No one was allowed
 "to approach the mines to run the machinery. Well, the mine
 "manager, like the mine managers everywhere, taking unto him-
 "self the idea that the mines belonged to him, said 'Certainly the
 "men won't interfere with us. We will go up and run the ma-
 "chinery.' And they took along the office force. But the miners
 "had a different notion, and they said 'You can work in the office,
 "but you can't run this machinery. That isn't your work. If you
 "run that you will be scabbing, and we don't permit you to scab—
 "not in this section of the country now.' They were compelled to
 "go back to the office. There were three hundred and twenty-five
 "horses under ground, which the manager Llewellyn complained
 "about being in a starving condition. The officials of the Union
 "said, 'We will hoist the horses out of the mine.' 'Oh, no,' he
 "said, 'We don't want to bring them up. We will all be friends in
 "a few days.' 'You will either bring up the horses now or you will
 "let them stay there.' He said, 'No, we won't bring them up now.'
 "The pumps were closed down on the Cambria Mine. Twelve thou-
 "sand miners were there to see that they didn't open. Llewellyn
 "started a hue and cry that the horses would be drowned, and the
 "King sent the police, sent the soldiers and sent a message to
 "Llewellyn asking if the horses were still saved. He didn't say
 "anything about his subjects, the men. Guarded by soldiers, a few
 "scabs, assisted by the office force, were able to run the pumps.
 "Llewellyn himself and his bookkeeping force went down and fed
 "the horses."

[fol. 325] Mr. Harris: Reading from page- 46 and 47 of that same book:

"The deadly: A declaration by the Industrial Workers of the
 "World.

"We, the Industrial Workers of the World, in convention as-
 "sembled, hereby reaffirm our adherence to the principles of Indus-
 "trial unionism, and re-dedicate ourselves to the unflinching prose-
 "cution of the struggle for the abolition of wage slavery and the
 "realization of our ideals in industrial democracy.

"With the European war for conquest and exploitation raging and
 "destroying the lives, class consciousness, and unity of the workers
 "and the ever-growing agitation for military preparedness cloud-
 "ing the main issues, and delaying the realization of our ultimate
 "aim with patriotic, and, therefore, capitalistic aspirations, we openly
 "declare ourselves determined opponents of all nationalistic section-
 "alism or patriotism and the militarism preached and supported by

"our one enemy, the capitalist class. We condemn all wars, and, for the prevention of such, we proclaim the anti-militarist propaganda in time of peace, thus promoting class solidarity among the workers of the entire world, and in time of war the general strike in all industries.

"We extend assurances of both moral and material support to all the workers who suffer at the hands of the capitalist class for their adherence to the principle, and call of all workers to unite themselves with us, that the reign of the exploiters may cease and this earth be made fair through the establishment of the industrial democracy."

On the opposite page entitled "Parallel, Pledge Given to Nation by American Federation of Labor."

"We, the officers of the National and International Trades Unions of America in national conference assembled in the capital of our nation, hereby pledge ourselves in peace or in war, in stress or in storm, to stand unreservedly by the standards of liberty and the safety and preservation of the institutions and ideals of our Republic.

"In this solemn hour of our Nation's life, it is our earnest hope [fol. 326] "that our Republic may be safeguarded in its unswerving desire for peace; that our people may be spared the horrors and the burdens of war; that they may have the opportunity to cultivate and develop the arts of peace, human brotherhood and a higher civilization.

"But, despite all our endeavors and hopes, should our country be drawn into the maelstrom of the European conflict, we, with these ideals of liberty and justice herein declared, as the indispensable basis for national policies, offer our services to our country in every field of activity to defend, safeguard and preserve the Republic of the United States of America against the enemies, whomsoever they may be, and we call upon our fellow-workers and fellow citizens in the hold name of Labor, Justice, Freedom and Humanity, to devotedly and patriotically give like service."

I shall read from "People's Exhibit No. 31" in evidence, which is entitled "How to Overcome the High Cost of Living," reading from the last paragraph on page 13, through all of page 14:

"The Industrial Workers of the World, the Revolutionary working class industrial union, is a strictly non-political organization, declaring that the workers must organize their industrial power and use it directly at the point of production, sign no contracts with employers, but take advantage of every opportunity to shorten the work day, curtail production and increase wages. Do away, as much as possible, with the outside strike, where workers leave the boss in possession of the job, and give him the opportunity to put scabs at work. Striking on the job and compelling the boss to pay strike benefits is better than long drawn-out starvation strikes. The only time the workers should leave the job is when the employer

"locks them out, and the revolutionary workers will develop the means to checkmate that. Direct action, sabotage, passive resistance, intermittent and irritation strikes are some of the tactics of the revolutionary Industrial Workers of the World. Before these tactics can become effective, the workers must develop and perfect their organization.

"The I. W. W. has no set tactics to be used on any and every occasion, regardless of the conditions that may prevail. A tactic that [fol. 327] "may be successful under some conditions may fail under others. The I. W. W. is a fighting organization that imbues the workers with the idea that they must think and act for themselves, generate confidence and ability to handle the various skirmishes between the workers and the capitalists. These skirmishes are the prelude to the social general strike that will end the rule of the capitalist and abolish economic classes from human society.

"The progressive program of the I. W. W. by which it will build the framework of the new society within the shell of the old, while at the same time getting ready to take possession of all the industries, will be put into effect as fast as possible whenever and wherever the workers generate the power to do so."

I shall read, ladies and gentlemen of the jury, from that book which is introduced in evidence in this case as "People's Exhibit 32," entitled "Sabotage," by Emile Pouget. I shall first read from page 13, that is, beginning at the bottom of page 13, Mr. Coghlan:

"What then is sabotage? Sabotage is: A. Any conscious and willful act on the part of one or more workers intended to slacken and reduce the output of production in the industrial field, or to restrict trade and reduce the profits in the commercial field in order to secure from their employers better conditions or to enforce those promised or maintain those already prevailing when no other way of redress is open.

"B. Any skillful operation on the machinery of production intended not to destroy it or permanently render it defective, but only to temporarily disable it and to put it out of running condition in order to make impossible the work of scabs and thus to secure the complete and real stoppage of work during a strike."

I shall read from the same book at page 20, next to the last paragraph:

"This booklet is not written for capitalist nor for the upholders of the capitalist system. Therefore, it does not purpose to justify or excuse sabotage before the capitalist mind and morals. Its avowed aim is to explain and expound sabotage to the working class, especially to that part of it which is revolutionary [fol. 328] in aim, if not in method, and as this ever-growing fraction of the proletariat has a special mentality, and hence a special morality of its own, this introduction purports to prove that sabotage is fully in accordance with the same."

Reading from page 27, now, of the same book:

"Now may we ask if this is right? Is this moral and just? Of course, if it be true that labor produces everything, it is both moral and just that it should own everything. But this is only an affirmation—it must be proven. We industrial unionists care nothing about proving it. We are going to take over the industries some day for three very good reasons: because we need them, because we want them, and because we have the power to get them. Whether we are 'ethically justified' or not, is not our concern. We will lose no time proving title to them before hand; but, we may, if it is necessary after the thing is done, hire a couple of lawyers and judges to fix up the deed and make the transfer perfectly legal and respectable. Also, if necessary, we will have a couple of learned bishops to sprinkle holy water on it and make it sacred. Such things can always be fixed—anything that is powerful becomes in due course of time righteous. Therefore we Industrial Unionists claim that the social revolution is not a matter of necessity plus justice, but simply necessity plus strength."

Reading from page 28, gentlemen, on the last paragraph:

"Now, we say this: If the instruments of production rightfully belong to the workers, it means that they have been pilfered from them, and that the capitalist class detains them in an immoral way. It is legal for the bourgeoisie to keep them in accordance to its own laws, but surely it is not 'ethically justifiable' from the point of view of our aforesaid comrade. If these instruments of production are ours, they are so as much now as they will be a hundred years hence. Also, being our property, we can do with it whatever we best please—we can run them for our own good, as we surely will; but if we choose we can also smash them to pieces. It may be [fol. 329] 'stupid, but it is not dishonest. The fact that the burglars have them in their temporary possession does not in the least impeach our clear title of ownership. We are not strong enough to get them back just now, but we cannot forego any chances of getting something out of them."

Reading from page 30, gentlemen, next to the last paragraph:

"If tomorrow we shall be fully justified to take away from the master class all of its industries, why shouldn't we, when it is a question of life and death to us to win or lose a strike, be entitled to mislay or hide for a short while a bolt, a wheel, or any other small fraction of its machinery?

"We admit that our attitude is indefensible before the capitalist code of ethics, but we fail to see how it can be consistently condemned by those who claim the capitalist system to be a system of exploitation, robbery and murder. We can't possibly understand how it is possible that we are fully entitled to all we produce, and then are not entitled to a part of it."

Reading from page 35, the first paragraph, gentlemen; and also over to page 36.

The Court: Just a minute. Ladies and gentlemen of the jury, you may now be granted a five-minute recess, and you are admonished at this time not to converse among yourselves or with any other person upon any subject connected with the trial of this case, or to form or express an opinion thereon until the case is finally submitted to you. Let the officers be sworn.

(Officers sworn to take charge of the jury.)

(Recess taken 11:10 o'clock a. m.)

After Recess

The Court: People against Whitney. Will counsel now stipulate that all the jurors are present?

Mr. Harris: The People will so stipulate, your Honor.

Mr. Coghlan: So will the defendant so stipulate.

Mr. Harris: We were about to read from page- 35 and 36 of the book entitled "Sabotage" by Emile Pouget:

"Saboteurs are the *eclaireurs*, the scouts, of the class struggle; [fol. 330] "They are the 'Sentinelles perdues' at the outposts, the 'spies in the enemy's own ranks. They can be executed if they are 'caught (and this is almost impossible), they cannot be disgraced 'for the enemy himself if it be gallant and brave, must honor and 'respect bravery and daring.

"Now that the bosses have succeeded in dealing an almost mortal blow to the boycott, now that picket duty is practically outlawed, "free speech throttled, free assemblage prohibited and injunctions "against labor are becoming epidemic; sabotage, this dark, invincible, "terrible Damocles' sword that hangs over the head of the Master "class, will replace all the confiscated weapons and ammunition of "the army of the toilers. And it will win, for it is the most redoubt- "able of all, except the general strike. In vain may the bosses get "an injunction against the strikers' funds—sabotage will get a more "powerful one against their machinery. In vain may they invoke "old laws and make new ones against it—they will never discover it, "never track it to its lair, never run it to the ground, for no laws "will ever make a crime of the 'clumsiness and lack of skill' of a "scab, who bungles his work or 'puts on the bum' a machine he "does not know how to run."

"There can be no injunction against it. No policeman's club. "No rifle diet. No prison bars. It cannot be starved into submis- "sion. It cannot be discharged. It cannot be black-listed. It is "present every where and everywhere invisible, like the airship that "soars high above the clouds in the dead of night, beyond the reach "of the cannon and the searchlight, and drops the deadliest bombs "into the enemy's own encampment.

"Sabotage is the most formidable weapon of economic warfare, "which will eventually open to the workers the great iron gate of

"capitalist exploitation and lead them out of the house of bondage into the land of the future." Signed "Arturo M. Giovannitti. Essex Co. Jail, Lawrence, Mass., August, 1912."

Reading from page 66, gentlemen, of the same book:

"From the radical difference, the persistence of which we have noted, between the working class and the capitalist class, there is naturally derived a different morality.

[fol. 331] "Indeed, it would be very strange if everything were different between the toiler and the capitalist except their morals. Now could we admit that the acts and attitude of an exploited workman should be judged and valued according to the criterion of his class enemy? It would be simply absurd.

"The truth is that, as there exist two classes in society, so there exist two moralities, the bourgeois morality and the proletarian morality.

Reading from page 71 with the third paragraph, to the top of page 72.

"Now, plain, common sense suggests that, since the boss is the enemy of the workers, the latter by preparing an ambush for his adversary, does not commit a bad or disloyal act. It is a recognized means of warfare, just as admissible as open and face to face battle.

"Therefore, not one of the arguments borrowed from the bourgeois morality is competent to judge Sabotage, just as none of these arguments has any weight and bearing on the judgment, acts, deeds, thoughts and aspirations of the working class."

"The bourgeoisie, of course, has felt itself struck at heart by Sabotage—that is, struck in its pocketbook. And yet—be it said without any offensive intention—the good old lady must resign herself and get used to living in the constant company of Sabotage. Indeed it would be wise for her to make the best of what she cannot prevent or suppress. As she must familiarize herself with the thought of her end (at least as a ruling and owning class), so it were well for her to familiarize herself with Sabotage, which has nowadays deep and indestructible roots. Harpooned to the sides of capitalistic society it shall tear and bleed it until the shark turns the final somersault.

"It is already, and shall continually become more so—worse than a pestiferous epidemic—worse, indeed, than any terrible contagious disease. It shall become to the body social of capitalism more dangerous and incurable than cancer and syphilis are to the human body. Naturally all this is quite a bore for this scoundrelly society—but it is inevitable and fatal.

[fol. 332] "It does not require to be a great prophet to predict that the more we progress, the more we shall Sabot."

I shall now read from "People's Exhibit No. 30, which is entitled 'Sabotage,' by Walker C. Smith—I presume 'Sabotage—Its His-

tory, Philosophy & Function" would be correct, the correct statement of what it is. Reading from Page 2, paragraph 1:

"Sabotage is the destruction of profits to gain a definite revolutionary, economic end. It has many forms. It may mean the 'damaging of raw materials destined for a scab factory or shop. It may mean the spoiling of a finished product. It may mean the displacement of parts of machinery or the disarrangement of a whole machine where that machine is the one upon which the other machines are dependent for material. It may mean working slow. It may mean poor work. It may mean misshipping packages, giving overweight to customers, pointing out defects in goods, using the best of materials where the employer desires adulteration and also the telling of trade secrets. In fact, it has as many variations as there are different lines of work."

Reading from page 3, the first paragraph: "Sabotage will sometimes be misused, flagrantly so; the same is true of every one of the weapons of labor. The main concern to revolutionists is whether the use of sabotage will destroy the power of the masters in such a manner as to give the workers a greater measure of industrial control. On that point depends its usefulness to the working class."

Reading from page 5, the last paragraph on the page, to the top, over to the top on page 6: "There exists today a labor market in which the wage workers sell their power to perform various tasks asked of them by the purchasers—the employing class. The labor power of the workers is a commodity. In selling their merchandise the workers must sell themselves along with it. Therefore they are slaves—wage slaves. In purchasing goods from a merchant one receives an inferior quality for a low price. For a low price—poor products. If this applies to hats and shoes, why not equally to the commodity sold by the laborer? It is from this reasoning that there arises the idea: For poor wages—bad work. This [fol. 333] 'thought is a natural one even to those who agree with society as it is now constituted. To those who do not look upon the wage system as a finality and who have come to regard the employers in their true light—as thieves of the laborers' product—the idea of sabotage commends itself still more strongly. It is a logical weapon for the revolutionist."

Page 9, the first paragraph—I mean the second paragraph, Mr. Coghlan, paragraph two: "To the rebellious toiler the class war is no mere theory. It is a grim reality. To him it is not a polite sparring match according to Marquis of Queensbury rules with four years between each round. It is love of liberty, and war against the exploiters. All's fair in love and war."

"Because the revolutionists has discarded the moral code of the master class and has spit in the face of bourgeois ethics, it does not necessarily follow that there is no rule regulating his conduct. He is, in fact, so strongly actuated by an ideal that he has left

"the arena of words to enter the realm of action. Sabotage is a direct application of the idea that property has no rights that its creators are bound to respect."

"However secret must be sabotage, when used by the individual instead of the whole body, it is taking its place in the rising moral code of the propertyless toilers just in proportion as it is being openly advocated. The outspoken propaganda of sabotage and its widespread use are true reflections of economic conditions. The current ethical code with all existing laws and institutions, is based upon private property in production. Why expect those who have no stake in society, as it is now constituted, to continue to contribute to its support."

On page 10, and the middle of page 11: "The charge that sabotage is 'immoral,' 'unethical,' 'uncivilized,' and the like, does not worry the rebellious workers so long as it is effective in inflicting injury to the employers' profits. As it aids the workers in their fight it will find increasing favor in their eyes. In war the strategic move is to cut off the opposing force from the base of supplies. [fol. 334] "Sabotage seeks to curtail profits, and in conjunction with other weapons to abolish finally the surplus value, or unpaid labor, that is the source of the employers' power.

"You are immoral" cry employers and politicians alike. Our answer is that all morals today are based upon private property. Even so-called sexual immorality is condemned while universally practiced, because it violates the principle of inheritance in property and is in defiance of customs generally accepted but seldom inquired into. When the workers accept their morals from the capitalist class they are in a sorry way indeed. The question is not, "Is Sabotage immoral?"—but, Does sabotage get the goods?

"You are destroying civilization" is likewise hurled against us, to which we reply in the language of the street: "We should worry!" Civilization is a lie. A civilization that is builded upon the bended backs of toiling babes; a civilization that is reared upon the sweating, starving, struggling mass of mankind; a civilization whose very existence depends upon a constant army of hungry, servile and law-abiding unemployed, is scarcely worthy of consideration at the hands of those whom it has so brutally outraged. The saboteur carries on his work in order to hasten the day of working class victory, when for the first time in human history we shall have a civilization that is worthy of the name.

"What is more civilized than for the workers to create powder that refuses to explode?

"What is more civilized than to work slow and thus force employers to give a living to more of the unemployed?

"What is more civilized than to spike the guns when they are trained on our working class brothers in other countries?

"What is more civilized than to waste the adulterations given the workers to place in food, thus making it unprofitable, to sell impure products?

"Sabotage will civilize the soldier, the militiaman, the police, the speeder, the slave driver, the food poisoner, the shoddy manufacturer, the profit grabber of high and low degree, and even the politician."

[fol. 335] "Those who oppose sabotage on ethical grounds are the porters of capitalist theft and are faithful watchdogs of the straits wherein the masters store stolen wealth. Revolutionists have no time to waste in taking lessons in correct manners from those who do no useful labor in society. In advocating sabotage we hope to show that the workers should rid their minds of the last remnants of bourgeois cant and hypocrisy and by its use develop courage and individual initiative."

"From sabotage to gain better conditions it is a logical step to direct sabotage against the repressive and perverting forces of capitalism."

Reading from the same book on "Sabotage", at page 13—rather at the bottom of page 11: "As a whole the reporters are favorable to the workers. They have to follow the policy of the papers to hold their jobs, however. They can use sabotage on the masters by the handling of the news. The editors of the various departments will color the matter anyhow, in accordance with wishes of advertisers or stockholders of the paper. But when an article is written that is harmful to the working class there are many ways in which it can be sabotaged. The linotype operator can misplace a portion of the copy. The proofreader can insert or remove the word 'not' and thus change a knock to a boost. The make-up man can place another article where it was intended the lie should go or he can insert a part of another article under the offending heading so that it will apparently read correctly and yet will not contain the harmful material, the stereotyper can damage the face of the offending article so that it will not print. These are but a few of the many methods that might be used. All of these 'accidents' are happening every day in publishing plants and it but remains to direct them to a revolutionary end. With more class consciousness along these lines the employers will find it does not pay to lie about the workers."

"One of the repressive forces of capitalism, the militia, can be made useless by the extension of the use of sabotage. One saboteur can make harmless toys of the entire equipment of a company." [fol. 336] "When a trainload of soldiers are dispatched to a strike scene, where they always act in the interest of the employers, the train can be sabotaged. In Parma, Italy, for example, the farmers and laborers struck. Soldiers were ordered to the scene. The engineers refused to pull the train from the depot. Volunteers to man the engines were secured from the ranks of the soldiers. When these scabs entered the cab they found that some vital part of each engine had been misplaced. They were forced to walk to Parma. Bridges disappeared in advance of the line of march. When the weary and disgusted troops arrived at the scene of the agricultural strike they found that the strikers had won and were back at work. Realizing that the railroads are the arteries of commerce the capitalists of this country have practically purchased the engineers

pay a high wage and the establishment of an aristocracy of labor. But a few rebels are bound to creep into their ranks. Even if every one of them remained a traitor to the workers by being loyal to the employers still they could not escape sabotage. A bar of soap in the boiler would keep the soldiers at home or else force them to march to the strike. If this were not possible, there are water tanks where the tender must be filled and the saboteur can 'Let the Gold Dust twins do the work'.

"In case of wars, which every intelligent worker knows are wholesale murders of workers to enrich the master class, there is no weapon so forceful to defeat the employers as sabotage by the rebellious workers in the two warring countries. Sabotage will put a stop to war when resolutions, parliamentary appeals and even a call for general refusal to serve are impotent. But, as stated before, sabotage is but one phase of the question. Anti-military and anti-patriotic agitation must be also carried on.

Sabotage is a mighty force as a revolutionary tactic against the repressive forces of capitalism, whether those repressions be direct or through the State.

"It is guerilla warfare", is another cry against sabotage. Well, what of it? Has not guerilla warfare proven itself to be a useful thing to repel invaders and to make gains for one or the other of the [fol. 337] opposing forces? Do not the capitalists use guerilla warfare? Guerilla warfare brings out the courage of individuals, it develops initiative, daring, resoluteness and audacity. Sabotage does the same for its users. It is to the social war what guerillas are to national wars. If it does no more than awaken a portion of the workers from their lethargy it will have been justified. But it will do more than that; it will keep the workers awake and will incite them to do battle with masters. It will give added hope to the militant minority, the few who always bear the brunt of the struggle.

The saboteur is the sharpshooter of the revolution. He has the courage and the daring to invade the enemy's country in the uniform of a 'loyal', that is to say—subservient, worker. But he knows that loyalty to the employer means treason to his class. Sabotage is the smokeless powder of the social war. It scores a hit, while its source is seldom detected. It is so universally feared by the employers that they do not even desire that it be condemned for fear the slave class may learn still more its great value.

Indeed, it can be seen that the masters are powerless in the face of this weapon. In the realm of production the masters do not enter except by indirection. The creation of wealth is the work of the wage slave class, and every tendency of this class is toward sabotage."

Reading from page 15, the middle of the page: "In warfare a flank movement is always feared by each of the opposing forces. In the social war sabotage is the best kind of a flank movement upon our enemy—the employing class. An actual instance will serve to illustrate the point.

"On an orchard farm in the State of Washington a disagreement arose over conditions on the job. A strike took place. The I. W. W.

"members among the strikers immediately telephoned to the union the nearest city. When the employer arrived in town looking for a new crew he was rather surprised at his speedy success. Full [fol. 338] "was paid for the men and the railway train was boarded. At the first stop, about two miles from the city, the whole crew deserted the train. They were all members of the union. Returning to the city the farmer picked up a second crew. He arranged to have them pay their own fare, same to be refunded upon their arrival on the farm. This crew went through all right and worked for a while under the farmer's direction. Thinking the strike was successfully broken the employer finally busied himself with other matters for the rest of the day. Next morning upon visiting the work the farmer was surprised to find that 1,000 young trees had been planted upside down, their roots waiving to the breeze as a manifest evidence of solidarity and sabotage. No further argument was needed to convince the farmer of the 'justice' of the demands of the original crew."

On page 18, beginning at the middle of the page, gentlemen: "Armed with a knowledge of sabotage the workers returned to the task more terrible in defeat than in victory."

"Nor can the military forces be successfully employed against sabotage. The employers could not long afford to have a soldier guard each worker. The workers, in fact, would immediately rebel when placed under such espionage. Neither is there any surety that sabotage will not have permeated the army. It is there already and it is growing in favor. Even were the workers to allow the military rule it might mean that sabotage would cease for the time being, to break out all the more fiercely the moment the soldiers were withdrawn, but more likely the natural resentment against such espionage would lead to an increased amount of sabotage. Wealth cannot be created with bayonets. The employers well know that their rule rests upon the peaceful acquiescence of the workers. They will scarcely undermine their own foundation by employing soldiers to massacre an entire force when a militant minority use sabotage."

The Court: It is now 12 o'clock. We will adjourn until 2 o'clock. Ladies and gentlemen of the jury, you are admonished at this time that it is your duty not to converse among yourselves or with any other person upon any subject connected with the trial of this case, to form or express an opinion thereon until the case is finally submitted to you.

(Officers sworn to take charge of jury, a recess taken until 2 o'clock p. m.)

[fol. 339] Q. You saw C. L. Lambert at Sacramento, did you say?

A. Yes.

Q. Did you have any conversation with him concerning these stickers or stickerettes—whatever you want to term them?

A. I never had a direct conversation.

Mr. Coghlan: You did not have any conversation, did you say?

Mr. Harris: Just a second. I will conduct the examination of this witness.

Mr. Coghlan: If he did not have any direct conversation, how could he?

Mr. Harris:

Q. Were you present when any conversation was held?

A. I was present at the business meeting when those stickers were discussed and ordered.

Q. A business meeting of what?

A. The I. W. W.

Q. When the stickers or stickerettes were discussed?

A. Yes.

Q. Where was that business meeting held, please?

A. The I. W. W. Hall, on "I" Street, Sacramento, California.

Q. About when?

A. It was some time early in 1914.

Q. Were there any people there other than the I. W. W.'s at this meeting?

A. No, I don't know—no, there was not.

Q. About how many people were present at this meeting?

A. Oh, about thirty or forty.

Q. Do you happen to know any of them?

A. I know several of them.

Q. Will you give us the names of those people that you now recollect as having been there, Mr. Coutts?

A. There was Henry Evans, Frederick Esmond, C. L. Lambert, and several others that I cannot recollect their names now.

Q. What discussion was held at that time and place, please, concerning these stickerettes?

Mr. Pemberton: Just a minute. Objected to, if your Honor please.

The Court: Was this at a business meeting?

Mr. Pemberton: It is hearsay, something held entirely outside of the presence of this defendant; she had nothing to do with it and knew nothing about it.

The Court. It may be overruled.

[fol. 340] A. There was a discussion as to effective means of getting what they wanted; namely, getting Ford and Suhr out of jail, to set them free at that time. That was shortly after they were tried, and Lambert suggested this means of advertising it.

Q. He suggested what?

A. This means of advertising it.

Q. Was any action taken at that time in regard to these stickerettes?

A. Yes.

Mr. Pemberton: Our objection goes to all of this.

The Court: Yes sir.

A. There were something 22,000, or something of that kind, ordered from a printing house in San Francisco.

Mr. Harris:

Q. 22,000 ordered, of these stickerettes?

A. Yes.

Q. Was there anything said as to what would be done with them?

A. They were, yes, they were—the means of distribution of them was discussed.

Q. How was that? How were they to be distributed?

A. They were to be taken by the members and pasted up by means of the glue on the back of the stickers to whatever they would stick them to.

Q. Were there any other stickerettes?

A. Well, I think a week or two later there were some more ordered, 20,000, or something like that.

Q. During this meeting was anything said concerning a defense committee?

A. Yes, there were several meetings where defense committees were discussed.

Q. Defense committees for what?

A. For the Henry Ford and Suhr—no, I am mistaken—Blackey Ford—his name is Richard Ford.

Q. Do you remember who the members of that Defense Committee were?

A. Well it is kind of obscure in my mind as to just what time they were members, because—there were several members—I know that Theodora Pollock was a member at one time, and Fred Esmond was, and Andy Barber, and Lambert was, C. L. Lambert, and there were several members that I did not know.

Q. Will you tell us again what was said about distributing these stickerettes?

A. They were to be given away—to be given to the different [fol. 341] members of the I. W. W. and were to be distributed mainly in places particularly where people did not want them to be, like plate glass windows located in front of stores, to make them doubly obnoxious to the capitalist class.

Q. Did you afterwards see any of these stickerettes?

A. Yes; stuck up in the windows and on automobiles.

Q. At this meeting at Sacramento, did you see anything concerning this pamphlet, see anything read from "People's Exhibit 28" in this case, which was the Industrial Workers of the World proceedings of the Tenth Convention?

A. No, sir.

Q. Nothing was read from that at that time?

A. No, sir. At that time the Tenth Convention had not been held.

Q. It had not been held at that time?

A. No, sir.

Q. During this time that you were a member of the Industrial Workers of the World, were you ever in Oakland?

A. Yes.

Q. Where were you in Oakland?

A. The I. W. W. Headquarters.

Q. Where were they at that time?

A. 338 5th Street.

Q. Who was the secretary at that time?

A. The last time, Mortimer Downing was Secretary.

Q. Who else?

A. I cannot name all of the secretaries; there were several of them here at different times. One time it was a fellow by the name of Nelson, and another by the name of Morgan, and Ben Kline, and Plunkett.

Q. How long did you remain in Oakland when you were here?

A. I remained various lengths of time. I have been here several times.

Q. Pardon?

A. I had been here several times. I don't know just which time you mean.

Q. I will ask you whether or not you have ever heard Esmond and Downing speak, or either of them?

A. I have.

Q. Where did you hear Esmond speak?

A. I have heard him speak in the Plaza at Sacramento, and I heard him speak—

Q. The Plaza?

A. Yes.

Q. Is that the Plaza at 9th and "J" Streets?

A. Yes, and I heard him speak at San Francisco, and I have [fol. 342] heard him speak here in Oakland on some occasions.

Q. What, if anything did you hear Esmond say in his speech?

Mr. Coglan: If the Court please, that would be hearsay, if it please your Honor, aside from every other objection. It would be pure hearsay, not even binding upon the organization that he might have been present at.

Mr. Harris: We contend in that decision the rule is laid down.

The Court: I don't think it would be, in that way.

Mr. Harris: We will pass that for the time being, then, your Honor, because we contend that under that decision which was submitted to your Honor. We contend that that testimony is admissible.

Mr. Coghlan: What is that decision again?

Mr. Harris: That is the 245th U. S. at page 229.

Q. Where else did you attend meetings of the I. W. W. organization please?

A. I attended them in San Francisco—well, practically everywhere I have been that they had I. W. W. halls.

Mr. Harris: May we take our customary recess, if the Court please?

The Court: Yes, you can take a recess, for five minutes. It is your duty, ladies and gentlemen of the jury, not to converse among

yourselves, or with any person, upon any subject connected with the trial of this case, or to form or express an opinion thereon until the case is finally submitted to you.

(At this point a short recess was taken.)

The Court (after recess): Will you kindly stipulate, gentlemen, that the jury are all present? Will you so stipulate that the jury are all present?

Mr. Harris: Yes, your Honor.

Mr. Coghlan: Yes, your Honor.

The Court: You may proceed.

Mr. Harris:

Q. Mr. Coutts, you have testified concerning meetings at Sacramento of the I. W. W. organization. Was anything said concerning hop fields?

Mr. Coghlan: Same objection, if the Court please, your Honor, of course, and the further objection that it is hearsay and calls for a conclusion, and is leading and suggestive.

[fol. 343] The Court: Will you read the question, Mr. Reporter?

(The Reporter reads the question.)

The Court: It may be overruled. You may answer.

A. Yes, there was a great deal said about hop fields.

Mr. Harris:

Q. What, please?

A. That it would be a good idea to destroy them, to make the hop growers see the error of their ways for sending Ford and Suhr to jail. They claimed that they were responsible for the sending of them to jail.

Q. Was there any suggestion as to the manner in which that could be done?

A. Yes.

Q. What?

The Court: Wouldn't it be better to frame the question a little differently, and let's get the action of the body or the local known as the I. W. W.?

Mr. Harris: Very well.

Q. What, in the meetings, was suggested?

A. Well, at the meetings there was nothing suggested. It was an understanding through the members outside of the meetings as to what was to be done.

Mr. Coghlan: We then move that that be stricken out as not official action upon the part of that organization, that counsel is laying some stress upon, and therefore not competent, relevant and material, and not having any proper foundation, and that it is hearsay.

Mr. Harris: We contend that in view of the Lambert report that it had already cost the State of California eight million dollars to keep Ford and Suhr in jail and signed by Lambert as Secretary; that these underground methods, although probably not right out in the meetings, but if they had those underground methods in which they agreed as to the manner in which they should destroy this property, I claim it is admissible.

The Court: If they agreed to do that as a body, it would be admissible. But if it is just an individual action, or as an individual action as a probable reason for doing it, as has been suggested by the defendant's counsel, then it would, of course, not be admissible.

[fol. 344] Mr. Harris:

Q. Was anything said in the body meetings as to what was to be done?

A. You mean in the business meetings?

Q. Yes.

A. Well, there was some discussion, but it was always hushed up, so that it would not come out in the records of the meetings. There was an agreement to keep these things quiet.

Q. Then, other than as provided for in the minutes, there was an agreement between the members of the I. W. W. organization. Is that correct?

A. Yes.

Q. Will you relate what that agreement was, please?

Mr. Coghlan: Between what members? I think that would be proper.

Mr. Harris: Very well. Between what members?

A. Well, between all of them. It was that the I. W. W. organization was to be protected.

Q. Including Lambert, the secretary?

A. Yes.

Q. What was that, please?

A. I don't quite understand what you mean.

Q. What agreement was made between the members as to how or in what manner action would be taken in regard to the hop fields?

A. Well, they were to do everything, use sabotage on them, as was said, and do everything they could to destroy profits in the wheat fields, or rather, the hop fields, even to burn down the hop kilns, or anything of that kind. He said if it was necessary they would burn up the whole State of California.

Q. Who said that?

A. C. L. Lambert.

Q. Lambert said, if it was necessary, they would burn up the whole State of California?

A. Yes, he said that in a business meeting.

Q. Now, then, was there every any discussion concerning the war at the meetings?

A. Yes, there was a great deal of discussion concerning the war.
Q. What was that discussion?

Mr. Pemberton: Object, your Honor. That has nothing to do with this case. It might be a violation upon the part of the I. W. W. or some other law, but it has nothing to do with this law, or with this case. There is not a word in this case or in this law about war.
[fol. 345] Mr. Harris: About war?

The Court: Mr. Pemberton—

Mr. Harris: He said there was nothing in this case about war. I presume he meant under this section on syndicalism, there is no mention of war.

Mr. Pemberton: It has absolutely nothing to do with it, I say.

The Court: Let me see. I think I had better read the section.

Mr. Pemberton: It may be that I misunderstood the question, but I think not. You referred to the war.

Mr. Harris: Yes.

The Court: Yes.

Mr. Pemberton: The particular war that has been recently going on.

Mr. Harris: Yes, sir.

Mr. Pemberton: There is absolutely nothing about it in this case or in this law. Other law governs that, but Miss Whitney has nothing to do with this. She had never been charged with a violation of it.

The Court: Doesn't it come in under this section here? Unless it was just the bare question, as it says, as it was already propounded, it would be nothing unless it is to be followed up, of course. Just if they said anything about the war, that would not be material.

Mr. Harris: No, no, your Honor, it is going to be followed up, of course.

The Court: If it is preliminary, he can answer it "Yes" or "No."

Mr. Pemberton: He has answered "Yes," and then been asked what it was.

The Court: Let the answer stand, then, and propound another question.

Mr. Harris: Very well, your Honor.

Q. What, if anything, was said in regard to the I. W. W.'s attitude towards the war?

Mr. Pemberton: Same objection.

The Court: Their attitude?

[fol. 346] Mr. Harris: Yes, if the Court please. We are trying to show the example set by the I. W. W.

The Court: Just what they did about the war, would that be criminal?

Mr. Coghlan: If counsel's contention be correct, let me be understood—it would not be material what might have been said about the war, or rather, what the attitude of the I. W. W. was with relation to the war, but what it was with relation to these things that

are set out here in the act that your Honor has before you, criminal syndicalism, for instance——

The Court (interrupting): Yes, it is defined in the first section.

Mr. Coghlan: There are three general subdivisions of it.

The Court: It is defined as any doctrine or precept advocating, teaching, aiding or abetting the commission of crime, sabotage, which is then defined by unlawful acts of force or violence, or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or affecting any political change. Then the next section "By spoken or written words or personal conduct that advocates, teaches or aids and abets criminal syndicalism, or the duty, necessity of propriety of committing crime, sabotage, violence, or unlawful methods of terrorism." It goes on through industrial control and change of government right along there.

Mr. Pemberton: But syndicalism is not forbidden by that statute; crime is not forbidden by that statute; violence is not forbidden by this statute, as far as this one statute is concerned, except *with* used as a means for certain purposes.

The Court: Yes, it has to be the means of bringing about or accomplishing change in industrial ownership or control, or affecting any political change.

Mr. Pemberton: Otherwise it is not within the review of that statute at all.

Mr. Harris: Our point being this, if the Court please, that we expect to show by this witness that the attitude of the I. W. W. was [fol. 347] that they would not go to war, but that this is the time during the period of the war to strike and to force the United States Government into this industrial change that they set forth.

Mr. Pemberton: Well, striking is not forbidden by this statute. Maybe it ought to be, but it is not.

The Court: Striking is not prohibited by this Statute, no.

Mr. Harris: Certainly not, but included within the strike situation would be advocating sabotage, which we will show by this witness, and the burning down of buildings, and so forth.

The Court: I don't think the question is a proper one. I think that the objection is good. It may be sustained.

Mr. Harris:

Q. Do you know a man by the name of Robert Kinnellan?

A. Yes.

Q. Commonly known as "Dublin Bob"?

A. Yes.

Q. How long have you known him?

A. Since 1914.

Q. What, if anything,—withdraw that. What organization did he belong to?

A. The I. W. W. the Industrial Workers of the World.

Q. And did he belong to any particular class of the I. W. W.? Was he termed under any class of the I. W. W.?

A. He was termed a "cat."

Q. He was termed a "cat." What do you mean by a "cat"?

A. A person who does these acts of sabotage.

Q. A cat is the person who does the acts of sabotage?

A. Yes.

Mr. Coghlan: Do you intend to connect, or show, that this lady was acquainted with Robert Kinnellan?

Mr. Harris: I think not, Mr. Coghlan. But we do expect to show that she was acquainted with others who were associated with Kinnellan in doing certain work.

Q. Did you ever see Kinnellan or "Dublin Bob," as he is commonly termed, in the headquarters at Oakland?

A. Yes.

Q. When was that, approximately when?

A. Why, during March, April and May of 1917.

Q. "Dublin Bob" had been at Stockton, hadn't he?

A. Several years prior, yes; about 1914.

Q. Did he hold any position in connection with the Industrial [fol. 348] Workers of the World?

A. He was secretary at Stockton at that time.

Q. Did you ever see Kinnellan at the headquarters in Oakland?

A. Yes.

Q. Did you ever do any work at the headquarters in Oakland?

A. Yes.

Q. Will you relate to the jury what, if anything, you did at the headquarters of the I. W. W. in the City of Oakland?

Mr. Pemberton: Objection, as not material. Is this defendant to be charged with what this young man did?

The Court: Let the question be answered. It may be overruled.

A. I made an electric furnace to make phosphorus in.

Mr. Harris:

Q. An electric furnace to make phosphorus in?

A. Yes.

Q. Who was the secretary at the Oakland headquarters at that time?

A. Mortimer Downing.

Q. Where did you make this electric furnace, please?

A. In the back part of the Hall; there was—the Hall has two rooms in it, well, not exactly rooms; one main room and a—

The Court (interrupting): This will be connected up, I assume, as a matter of the organization action?

Mr. Harris: Yes, your Honor.

Q. This was in a back room?

A. Yes, kind of a hallway, a long hallway that ran the full length, or rather, the full width of the hall.

Q. Where did you get the material to make this?

A. From different members of the I. W. W.

Q. What?

A. From members of the I. W. W. and one of the pots we used was a large flower pot that had flowers in it.

Q. Who was present when it was suggested that this be made?

A. There were several present, the secretary and Louis Gavelli.

Q. All members of the I. W. W.?

A. Yes.

Q. And that suggestion was made at the headquarters here in Oakland?

A. Yes.

Q. How long did it take you to make it, about?

[fol. 349] A. Oh, quite a little while, because I did not work on it regularly, a couple of weeks or so.

Q. And you say you made phosphorus with it?

A. No, we did not make phosphorus with it.

Q. What did you make with it?

A. We did not make anything; we did not have it made right.

Q. You did not have it made right?

A. No, sir.

Q. What was the purpose of it?

A. To make phosphorus.

The Court: I don't see what materiality, then, it has, if the purpose failed. I don't see what materiality it has then.

Mr. Harris: What the purpose was?

The Court: There was nothing established——

Mr. Harris: If it was agreed between them that they should make it, but because of their lack of knowledge that they failed to make a perfect one, nevertheless wouldn't it be admissible?

Mr. Pemberton: Do you claim that Miss Whitney knew anything about that, or ever heard of it?

Mr. Harris: I don't know. But her friend, Miss Pollock, was there when it was being discussed. If that is what you want.

Mr. Pemberton: We assign the remark of counsel as error, and ask the Court to instruct the jury to disregard it.

Mr. Harris: We have no objection to the jury being instructed to disregard the remark, and I apologize to the jury and the Court. But counsel continually eggs on for the purpose, seemingly, of getting something into the record.

The Court: Let the jury now be instructed to disregard the remark of Mr. Harris as just given voice to when he referred to some lady by the name of Miss Pollock.

Mr. Harris:

Q. What was done with this furnace?

A. It was taken to Stockton, California, later on.

Q. Taken where?

A. On a house boat on Smith's Canal, in Stockton.

Q. Whose house boat?

A. I think the boat belonged to a man by the name of Ed Ceni, and I. W. W. member.

Q. Who was there at the time?

A. When I arrived there, there was Ed Ceni, "Dublin Bob," Her-
[fol. 350] man Brewer, and I think—yes, a fellow by the name of
Smith. I forget his first name, and a fellow they called "Dutch."

Q. Were these people associated with any organization?

A. They all belonged to the I. W. W.

Mr. Harris: As I understand it, if the Court please, you have reserved the ruling as to whether or not any conversation between the particular members is admissible.

The Court: Yes; I want to examine the case you have cited here.

Mr. Harris: Very well, your Honor.

Q. How long did you remain at this house boat that you speak of, on the stream in Stockton?

A. Oh, from about the 27th of June until——

Mr. Coghlan:

Q. What year?

A. 1917.

Mr. Harris:

Q. What were you people doing, if anything, while there?

A. I did not finish that other answer.

Q. I beg your pardon.

A. From about the 27th of June until, I think, somewhere around the 21st or 23rd or 24th, somewhere around there, of July.

Q. What, if anything, were you people doing while there?

A. We were making incendiary bombs.

Q. What?

A. Making incendiary bombs.

Q. Making bombs—bombs for what?

A. To be used to set fire to barns and haystacks, and other things of that kind.

Q. Will you please describe those bombs that you were making, please?

A. They were made out of a piece of glass tubing about a quarter of an inch in diameter, slit up in one end with a Bunsen burner and blown into a bulb on the end of it and cut them off about an inch long and filled them with a solution of phosphorus dissolved in carbon bisulphide, and we put a rubber cork in the carbon bisulphide so it would eat the cork out and let the carbon bisulphide and phosphorus run out, and as soon as the carbon bisulphide evaporated the phosphorus would catch on fire.

[fol. 351] Q. How long would it take this substance to do that? First, what kind of cork was it?

A. It is a rubber cork.

Q. Of which you speak?

A. A rubber cork. Why, it would take several hours; it varied in length of time.

Q. And how many of these bombs, as you call them, did you make?

A. I don't know just how many there were. There was—we sent several boxes away of them.

Q. Pardon?

A. There was—I don't remember—somewhere around a hundred, maybe.

Q. Where did you obtain the phosphorus from?

A. Why, we generally got it down from the secretary in the Hall.

Q. The secretary of the I. W. W.?

A. Yes. I don't know where he got it from.

Q. Do you remember any particular occasion when you obtained phosphorus?

A. About somewhere along in the first week or so of April, 1917. We took some from Oakland to Stockton.

Q. What?

A. We took some phosphorus from Oakland to Stockton.

Q. Who was "we"?

A. A fellow by the name of Jimmie Valentine.

Q. Where did you obtain it?

A. I don't know. He got it, and I don't know where he did get it.

Q. You took it to Stockton?

A. Yes.

Q. Do you know how you happened to take it to Stockton?

A. It was on account of a letter that William Waye, secretary in Stockton, wrote to Mortimer Downing, the secretary at Oakland.

Q. What was done with this phosphorus?

A. It was delivered to the secretary at Stockton, William Waye.

Q. What was to be done with these bombs of which you spoke?

A. They were used to set fire; when we were there we distributed them out.

Q. Did you personally make any trips with the men and set fires, as you have described?

A. Two times, yes.

Q. Where did you make your first trip, please?

A. To Modesto, California.

Q. To Modesto?

A. Yes.

Q. Who went with you?

A. A man by the name of Caesar Tabbib.

[fol. 352] Who else?

A. He was the only one that went with me. Elmer Anderson and Leon Rubio.

Q. Do you know where Rubio and Anderson went?

A. They went in another direction, out towards a place called Denair.

Q. Where did you go?

A. Out along the country road, out of Modesto, to, I think, the northwest or west.

Q. What, if anything, did you and Tabbib have with you when you went there?

A. Some phosphorus.

Q. In what form was the phosphorus?

A. We had just pieces of phosphorus cut up and with wet rags rolled around them.

Q. Wet rags?

A. Yes.

Q. Will you describe that process, please?

A. They cut a piece of phosphorus off about a quarter of an inch square, and wrapped a couple of layers of cloth over it, thin cloth, and keep them in a bottle of water until you are ready to use them, then you take them out of the bottle of water, and in about two hours afterwards, why, the water would evaporate out sufficiently so that they would catch on fire.

Q. When you went down to Modesto with Tabbib, what, if anything, did you do?

A. We set fire to several places.

Q. What did you set fire to?

A. Barns and haystacks.

Q. How did you set fire to them?

A. Putting these pieces of phosphorus around in inflammable material.

Q. About how many barns and haystacks did you set fire to on that occasion?

A. Oh, I don't remember just how many there was. There were five or six, or something like that.

Mr. Harris: I understand your Honor is reserving the ruling as to what Anderson and the other men might have told him concerning what they did on the trips of this kind, until we have gone over this case, is that correct?

The Court: Yes.

Mr. Harris:

Q. What other trip did you make?

A. There was a bunch of us—well, four of us went from Stockton to Modesto.

[fol. 353] Who were the four, please?

A. Well, Leon Rubio and Harry Lewis, and another fellow, and myself.

Q. Where did you go?

A. From Stockton to Modesto; we went in an automobile, and set fire to several barns in Modesto.

Q. And approximately how many?

A. I think about eight of them.

Q. What did you do after that; what did you do after that?

A. We went back to Stockton, and on the way back we set fire to another barn.

Q. Now, then, that is two trips that you took.

A. Yes.

Q. You stated you took three of them?

A. No, sir.

Q. Two trips, is that what I understand?

A. Yes.

Q. While you were at this ark that you speak of with "Dublin Bob" and the rest of the I. W. W.s, what did you do with these bombs and things that you made?

A. Why, they were taken down to the I. W. W. hall to be distributed, and some of them were—well, I don't know—that is all about that.

Q. What?

A. Then some of them were taken to the I. W. W. hall to be distributed.

Q. Do you know where they were placed, the I. W. W. hall where?

A. Stockton, California.

Q. Do you know where they were kept there?

A. Under the sink.

Q. How did you happen to go to "Dublin Bob's" ark, or Smith's ark?

A. I was told by Mortimer Downing that "Dublin Bob" wanted me up there to help him.

Q. Mortimer Downing was at that time the secretary?

A. Yes, here in Oakland.

Q. Of the I. W. W.s here in Oakland?

A. Yes.

Q. Did you ever go to Turlock from Stockton?

A. Yes.

Q. Who went with you?

A. Herman Brewer.

Q. What, if anything, did you do when you went to Turlock from Stockton?

A. We took some phosphorus and some poison, some sulphuric acid to Turlock.

Q. Where did you keep it there?

A. In the woodshed.

Q. Of what place, of whose place?

[fol. 354] A. Well, it was a place that was rented for the I. W. W.s.

Q. How many I. W. W.s. were there there, about?

A. Well, it varied. There were sometimes a couple of hundred, and sometimes there were less.

Q. Do you know the names of any of the men who were there?

A. Yes.

Q. What are their names?

A. Well, there was Robert Feehan, Frank Elliott, Elmer Anderson and Caesar Tabbib.

Q. Was Frank Elliott the one that is known as "Skinny" Elliott?

A. Yes.

Q. How did he travel around the country, do you know?

A. By a bicycle.

Q. On a bicycle?

A. Yes.

Q. After you went to Turlock and took this phosphorus, did anything happen to your own knowledge?

A. Well, not immediately.

Q. Well, afterwards did anything happen?

A. Quite a while afterwards there was several fires around Modesto and that country.

Q. What was burned?

A. Haystacks and barns.

Q. And do you know where the Carver Road, the Tully Road, and the Dry Creek Road are?

A. Yes.

Q. In regard to that, where were these fires?

A. In that district.

Q. While you were at Turlock were there any trips made to Stockton by any members of the I. W. W.?

A. No, I don't think so. There were several of them went to Stockton; in fact, they were always going back and forth.

Q. You say you were at Dry Creek?

A. Yes.

Q. That is near Modesto?

A. Yes.

Q. What, if anything, took place there?

Mr. Pemberton: Does he know, or are you just having him tell what he heard?

Mr. Harris: I will connect that up.

Q. Were you ever at Dry Creek?

A. Yes.

Q. While you were at Dry Creek, what happened, if anything?

A. When I was there we made some of these bombs on the banks of Dry Creek.

[fol. 355] Q. Who was "we," to whom are you referring?

A. I didn't hear you.

Q. Of whom are you referring when you said "we made some bombs on the banks of Dry Creek?"

A. Elmer Anderson, Caesar Tabbib, Leon Rubio, and a fellow by the name of Costello.

Q. How did you make the bombs at that place?

A. We sent Rubio to Stockton to get some phosphorus, and he came back with it, and we went down there and made these bombs out of pieces of phosphorus and rags.

Q. Do you know where Rubio and Anderson went after being on the banks of Dry Creek when these bombs were made?

A. Well, I would like to be clear on this thing. With respect to this ruling, can I tell what one of them told me?

The Court: No, you cannot tell what one of them told you.

Mr. Harris: As I understand your question to his Honor was concerning what they had told you, whether or not the Court would permit that at this time.

A. Yes.

Mr. Harris: We have agreed that it will not be permitted at this time. That is correct, is it not, your Honor?

The Court: Yes.

Mr. Harris:

Q. You knew a man by the name of Dan Lavery, didn't you?

A. Yes.

Q. What organization was he a member of?

A. The I. W. W.

Q. There was a meeting at Stockton, in which his arrest was discussed, was there not?

A. Yes.

Q. What action was taken there?

Mr. Coghlan: Well, we object to that as hearsay, if it please the Court. It is the example, and not the conversation, as I understand it.

The Court: The action he called for now, didn't you?

Mr. Harris: I asked for the action, what action was taken?

Mr. Coghlan: Pardon me then, only the ordinary objection will be made then.

A. Well, it was brought up in the business meeting about him [fol. 356] being arrested, and there was some remark made about what they ought to do to Modesto, to go down and turn the cat loose on the town.

Mr. Harris:

Q. Turn the cat loose on the town?

A. Yes.

Q. Where was this man arrested?

A. In the town of Modesto.

Mr. Harris: This, it seems to me, is pertinent.

The Court: You want to know what action was taken.

Mr. Coghlan: (interrupting): I move that that observation be stricken out as hearsay.

The Court: What?

Mr. Coghlan: Some hearsay came from the lips of the witness that is not within your Honor's ruling.

The Court: Well, we don't want hearsay in there. I want the question read. (The Reporter reads question and answer.) Answer what they did.

Mr. Coghlan: What they did?

Mr. Harris: Very well, your Honor.

Q. What did you do?

A. Why, I and the four other fellows went down there—I mean three other—the four of us went down there.

Q. To Modesto?

A. That is the occasion I just related a while ago.

Q. This is one of the three trips you just told us about?

A. Two.

Q. Two of them——

A. Yes.

Q. What did you do?

A. Fired the Town of Modesto.

Q. How many fires did you set?

A. Why, there was several of them put out. I don't know how many burned.

Q. Approximately, how many did you set?

A. Oh, twenty-five, I should say.

Q. Who did you work with?

A. Leon Rubio.

Q. That is, you worked in pairs?

A. Yes.

Q. Did you and Rubio work together?

A. Yes.

Q. How did you go down there?

A. In an automobile.

Q. And after these twenty-five fires had been set, what did you do?

A. Why, we went back to Stockton.

Q. Whose automobile was this?

[fol. 357] A. It belonged to the other fellow; I don't know his name.

Q. Sastre?

A. I think that was his name, but I would not say.

Q. Do you know what organization this party belonged to?

A. He belonged to the I. W. W.

Q. Did you stop on the way to Stockton, on the way back?

A. Yes.

Q. Where?

A. To set fire to a barn somewhere just north of Manteca.

Q. Near Manteca?

A. North of it, yes.

Q. Then, what did you do?

A. Went on back to Stockton.

Q. Did you use up all the phosphorus on that trip that you took with you?

A. No, I don't think so; no, we did not.

Q. What did you do with the balance of it?

A. I think we buried it somewhere at that time.

Q. These fires took place in Modesto, as I understand it?

A. Yes.

Q. At Dry Creek, near Modesto; I believe you stated that you had made certain bombs or certain phosphorus, rags there, wrapped the phosphorus in rags?

A. Yes.

Q. Did you have any place there where you buried these?

A. Yes, there was a spring there, we used to bury them in that.

Q. Did you have anything else there besides the phosphorus?

A. Yes.

Q. What else did you have there besides the phosphorus, please?

A. Well, we had some sulphuric acid and some cyanide of potassium.

Q. You had some cyanide of potassium; what did you have cyanide of potassium for?

A. To poison stock with.

Q. To poison cattle with?

A. Yes, stock.

Q. Stock?

A. Yes.

Q. How where the stock poisoned?

A. By putting it in the water.

Q. What else did you say you had there, please?

A. I had some lye solution.

Q. What was the lye solution for?

[fol. 358] A. To put in men's shoes that would not join the I. W. W., and turn the cat loose on them.

Q. To put in men's shoes who would not join the I. W. W.?

A. Yes.

Q. What do you mean by the expression "turn the cat loose on them"?

A. Well, making them do as we wanted them to, to terrorize them.

Q. Have you seen this lye placed in people's shoes by the I. W. W. members?

A. I had a man accuse me of it once.

Q. Have you seen it done?

A. Well, I have, yes.

Q. Did you ever, while you were in this house-boat on the San Joaquin which you speak about with "Dublin Bob" and the other members of the I. W. W. making these bombs, were you paid any visit, official visit, by officers?

A. By Officers?

Q. Yes.

A. What do you mean?

Q. The Police Department?

A. Oh, the police—one time, yes.

The Court: I don't think this is within your province, I don't think.

Mr. Harris: I presume you are right; yes, your Honor.

Q. While you were associated with the Industrial Workers of the World, did you sell or dispose of literature, that is I. W. W. literature?

A. Sometimes I have.

Q. What literature?

A. Prayers and various pamphlets.

Q. Of the I. W. W. organization?

A. Yes.

Q. Where?

A. At different halls, at different times.

Q. What halls, for instance?

A. Well, mostly around Stockton.

[fol. 359] We shall now read from the book entitled "Sabotage, by Elizabeth Gurley Flynn. I. W. W. Publishing Bureau, 112 Hamilton Av. Cleveland, Ohio." We shall read from page 2 to the top of page 3:

"Sabotage.—The interest in sabotage in the United States has developed lately on account of the case of Frederick Sumner Boyd in the State of New Jersey as an aftermath of the Paterson strike. Before his arrest and conviction for advocating sabotage, little or nothing was known of this particular form of labor tactic in the United States. Now there has developed a two-fold necessity to advocate it; not only to explain what it means to the worker in his fight for better conditions, but also to justify our fellow-worker Boyd in everything that he said. So I am desirous primarily to explain sabotage, to explain it in this two-fold significance, first as to its futility and second as to its legality.

"Its Necessity in the Class War

"I am not going to attempt to justify sabotage on any moral ground. If the workers consider that sabotage is necessary, that in itself makes sabotage moral. Its necessity is its excuse for existence. And for us to discuss the morality of sabotage would be as absurd as to discuss the morality of the strike or the morality of the class struggle itself. In order to understand sabotage or to accept it at all it is necessary to accept the concept of the class struggle. If you believe that between the workers on the one side and their employers on the other there is peace, there is harmony such as exists between brothers, and that consequently whatever strikes and lockouts occur are simply family squabbles; if you believe that a point can be reached whereby the employer can get enough and the worker can get enough, a point of amicable adjustment of industrial warfare and economic distribution, then there is no justification and no explanation of sabotage intelligible to you. Sabotage is one weapon in the arsenal of labor to fight its side of the class struggle. Labor realises, as it becomes more intelligent, that it must have power in order to accomplish anything; that neither appeals for sympathy nor abstract rights will make for better conditions."

Reading from the bottom of page 4 of the same book:

[fol. 360] "Sabotage is to this class struggle what the guerrilla warfare is to the battle. The strike is the open battle of the class struggle; sabotage is the guerrilla warfare, the day-by-day warfare between two opposing classes."

Page 20, gentlemen:

"Putting the Machine on Strike

"Suppose that when the engineer had gone on strike he had taken a vital part of the engine on strike with him, without which it would have been impossible for anyone to run that engine. Then there might have been a different story. Railroad men have a mighty power in refusing to transport soldiers, strike-breakers and ammunition for soldiers and strike-breakers into strike districts. They did it in Italy. The soldiers went on the train. The train guards refused to run the trains. The soldiers thought they could run the train themselves. They started, and the first signal they came to was 'Danger.' They went along very slowly and cautiously, and the next signal was at 'Danger.' And they found that before they had gone very far that some of the switches had been turned and they were run off on to a siding in the woods somewhere. Laboriously they got back onto the main track. They came to a draw-bridge and the bridge was turned open. They had to go across in boats and abandon the train. That meant walking the rest of the way. By the time they got into the strike district the strike was over. Soldiers who have had to walk aren't so full of vim and vigor and so anxious to shoot 'daggers' down when they get into a strike district as when they ride in a train manned by union men."

Page 21 :

"With freight of course they do different things. In the strike of the railroad workers in France they transported the freight in such a way that a great trainload of fine fresh fruit could be run off into a siding in one of the poorest districts of France. It was left to decay. But it never reached the point of either decay or destruction. It was usually taken care of by the poor people of that district. Something that was supposed to be sent in a rush from Paris to Havre was sent to Marseilles. And so within a very short time the whole system was so clogged and demoralized that they had to say to the railroad workers 'You are the only efficient ones. Come back. Take [fol. 361] your demands. But run our railroads.'"

At page 29 of the same book :

"Sabotage a War Measure

"I have not given you a rigidly defined thesis on sabotage because sabotage is in the process of making. Sabotage itself is not clearly defined. Sabotage is as broad and changing as industry, as flexible as the imagination and passions of humanity. Every day workmen and women are discovering new forms of sabotage, and the stronger their rebellious imagination is the more sabotage they are going to invent, the more sabotage they are going to develop. Sabotage is not, however, a permanent weapon. Sabotage is not going to be necessary, once a free society has been established. Sabotage is simply a war measure and it will go out of existence with

the war, just as the strike, the lockout, the policeman, the machine gun, the judge, with his injunction, and all the various weapons in the arsenals of capital and labor will go out of existence with the advent of a free society."

[fol. 362] JOHN DIMOND recalled for further Direct Examination.

Mr. Harris:

Q. Mr. Dimond, did you testify that you were associated with the I. W. W. organization, the other day?

A. I did, yes.

Q. I asked you whether or not you had ever occupied any official position with them, or in connection with them, and your answer was what?

A. That I was secretary in Fresno.

Q. Do you know Miss Whitney?

A. I do.

Q. The defendant in this case?

A. Yes.

Q. Where did you first see her, Mr. Dimond, if you recollect?

A. I could not say accurately, Mr. Harris.

Q. Did you ever see her in San Francisco?

A. I have, yes, several times.

Q. Where?

A. I have seen her in the I. W. W. Headquarters at 222 Kearny Street, and I have seen her in the offices of the People's Council in the Foxcroft Building.

Q. When you say in the I. W. W. headquarters, you mean in the Industrial Workers of the World headquarters, in San Francisco?

A. Yes, I do.

Q. Can you fix the time as nearly as you can, please?

A. I would say the latter end of July or the early part of August.

Q. What year?

A. 1918.

Q. Who was there, as nearly as you can recollect?

A. Herbert Stredwick was secretary.

Mr. Coghlan: This is merely preliminary.

Mr. Harris: Well, I do not know as it is.

Mr. Coghlan: I have been in the same place.

Mr. Harris: I know; you represented them.

Mr. Coghlan: I represented some of them—I don't think it will be contended by the prosecution, however, that I have been guilty of a violation of the act denouncing syndicalism by reason of my visits there. The fact is that it was in the upkeeping of the traditions of the profession that I went there.

Mr. Harris: I have no doubt of that.

[fol. 363] Mr. Coghlan: If this is merely preliminary to something else, possibly it is material. But otherwise, I cannot see its materiality.

Mr. Harris: I think that we are entitled to show any interest that she has in the I. W. W. organization.

Mr. Pemberton: Anything that would prejudice her before the jury.

Mr. Harris: No, sir: I am making this offer in good faith. If she has been seen in the I. W. W. headquarters, I think it is a matter that can go to the weight and can be considered by the jury.

Mr. Pemberton: There is nothing in this statute in itself that forbids anybody from going to the I. W. W. headquarters, or to State's prison, or to anywhere else.

Mr. Coghlan: The statute condemns certain things for crimes. But they are wandering very far afield generally introducing everything that does not suit their notions of what is exactly respectable, and of course the best citizen in this community, among whom we number ourselves, we cannot get away from the fact that we have visited the meetings of the I. W. W., possibly having friendships with members of the I. W. W. But it seems to me—I am not a bit afraid of the prejudicial effect of visiting there, but it is not material, and there isn't any necessity for encumbering this record with a possible view to merely showing a curiosity, such as any American citizen—your Honor, or anybody else—might have, as to the workings of that organization or an affection for some person in that organization. Therefore, I ask if this is a fact of itself that they are attempting, or preliminary to something else? If counsel deems it a matter of proof which ought to go to the jury as tending in some degree to fasten the principles of the I. W. W. upon this lady but does not follow it up with any proof that she was a member of the organization, or ever had anything to do with the organization or the workings of the organization, it certainly seems to me that it is not material. We ought to stop somewhere; we ought not to wander so far afield, because innumerable people have visited the meetings of every organization. That is one of the privileges of American citizenship, and it ought not to contribute in a case of this kind to [fol. 364] some of the evidence of the prosecution upon an accusation of this character. That is my criticism, and I say it with entire friendship, with no feeling that counsel is attempting to do anything that he does not think is perfectly right. That is not the proposition with me—nor do I think it exceedingly harmful. But I don't think it is material. If we, for the defense, should wander that far afield, I think your Honor would very properly stop us.

Mr. Harris: I cannot but feel that we realize and appreciate what this line of testimony is, and on what theory this line of testimony is admitted; namely, the testimony of the witness Coutts and Dimond, to show the I. W. W. activities and the Example and Propaganda of that organization, and following that, we have the Communist Labor Party greeting it, as they say, "We greet the revolutionary industrial proletariat of America, and pledge them our whole-hearted support and co-operation in their struggle against the capitalist class." I cannot help but feel that we have a right to show all of her connections in regard to the I. W. W. element, and if she was a visitor at the I. W. W. headquarters, I

think we can show that. I feel that I have made the offer in good faith—of course, if your Honor does not agree with me, I shall gladly abide by your Honor's ruling. But I say to you, with all frankness and candor, as I have just said, that this is along that same line, and that we expect to show what this witness, or this defendant, has done for the I. W. W. members, that we consider was part of her whole-hearted support, as laid down in the Communist Program and Platform at Chicago.

Mr. Coghlan: Of course, your Honor's ruling in this matter, it seems to me, should not be made until your Honor has refreshed his mind with regard to the matter of proof that has already been offered here. But your Honor will remember that that resolution which was imported into the proceedings of the local organization, of which this lady has been proven to be a member, that that resolution was opposed by Miss Whitney and passed over her consent and against her vote. Now, whereas, we all know where a conspiracy is charged or is the theory of the prosecution, we can go far afield in securing declarations of co-conspirators, declarations of accomplices, and so forth. But this is distinctly a different matter, and this case stands upon which Miss Whitney advocated, does it not? Are those the words of the statute. Which she sanctioned herself. As your Honor knows, and counsel, and everybody else within the hearing of my voice, at a convention of any political party, there are innumerable resolutions that you or I might oppose in the passage of them. That is to say, that would not express our views at all, nor would we advocate the principles laid down in that particular resolution. But, nevertheless, that resolution may pass and become a part of the party platform, or a part of those proceedings, recognized as official, something done by that convention. But that does not itself bind criminally upon a person charged with advocating in person the commission of crime. For instance—or, the adherence to such principles as counsel says are principles of the I. W. W. That, it seems to me, is one of the preliminary things that your Honor ought to consider, that you must eliminate that from her. There is certainly, there must be, in this offense, as well as in any other, we must import Section 20 of the Penal Code, that in every crime or public offense there must be a joint operation of act and intent. Of course, that throws a lurid light upon the question of intent. If Miss Whitney does not subscribe to sabotage, as appears, I believe, from her conduct in this convention, if Miss Whitney did not subscribe to this thing which counsel has imported into this case because it was adopted by that convention, then it seems to me it has no place here in all fairness to this lady, by reason of the fact that it does not show her intention at all, but that her refusal or her vote against the proposition shows her intention and shows it clearly, and that fact has already been proven to this jury through the instrumentality of all of this convention record that has been offered here by the prosecution. That is one thing. Another thing is: It seems to me, if the Court please, that this is not relevant, competent or material, and has at this time, anyway, no proper foundation.

Mr. Harris: I do not get counsel's first point at all, about the vote in the convention as having no bearing or any materiality as to the endorsement of the platform which they so highly recommend [fol. 366] mended the Industrial proletariat to.

Mr. Coghlan: That is the sole basis, is it not? That is the door through which the Court has allowed the introduction of this testimony.

Mr. Harris: Absolutely.

Mr. Coghlan: Now, then, you say—now, then, a resolution appears here that was opposed, as appears here from the lips of one whom you put upon the witness stand, I think Mr. Taylor, and I think was opposed by Miss Whitney.

Mr. Harris: What is that resolution?

Mr. Coghlan: You ought to remember your record better than I do. My impression of it is—it is to the effect that the resolution was offered there, rather, that the resolution was addressed by the Committee on Resolutions, if I remember, of which this lady was a member, and that that resolution was offered by the Committee on Resolutions and was rejected by the convention, and that in lieu thereof, the very proofs upon which you ride all this matter into evidence was taken in as the action of the convention. Now, I may be wrong—if counsel can correct me upon that, I shall be very glad to be corrected, because I came here late.

Mr. Harris: The resolution is in evidence; it speaks for itself. The Clerk can get it.

Mr. Coghlan: The evidence is all that I have.

Mr. Pemberton: The evidence is that she was in favor of only political action.

Mr. Coghlan: That appears at page 94 and 95 of the record, I think. I think Mr. Harris himself, in the abundance of his fairness, which is an extraordinary thing—I believe, having perused this record rather thoroughly, as far as I have gone, said these words "It is my desire to be absolutely fair. So while I am not certain, it is evidently shown by the reports of the committees that Miss Whitney as one of the members of the committee, the committee having rendered its report, indicates that she was for changes suggested by political action as being the method of the change rather than industrial action of the masses."

[fol. 367] Mr. Harris: This is a resolution?

Mr. Coghlan: It is not the resolution, but the action upon the resolution. If you would like that,—I am referring to, of course, the record, and the record is the best evidence of that, of course—if you have got no better proof of it. Here is the resolution to which reference is made, your Honor. (Reading:)

"Q. Then so I may understand it thoroughly. Do I understand that the resolution then was to adopt the whole platform and not anything in particular about this one measure upon which the committee has been appointed?

"A. I don't just remember the resolution. If you read it through, then I will criticize and state just what were, and what we objected to.

"Q. I will hand you these resolutions and let you pick out for yourself, Mr. Taylor, the resolutions which you are referring to.

"A. By the resolutions selected here.

"Q. This is the resolution. I offered it and the Court admitted it, but it would be more clear to the jury if I might read it again. (Reading:) 'The C. L. P.'—that is the Communist Labor Party of California, I assume—"fully recognizes the value of political action as a means of spreading Communist propaganda; it insists that in proportion to the development of the economic strength of the working class, if the working class must also develop political power"—"it," the working class, I suppose it is—"must also develop political power. The C. L. P. of California proclaims and insists that the capture of political power, locally, or nationally, by the revolutionary working class can be of tremendous assistance to the workers in their struggle of emancipation therefore we again urge the workers who are possessed of the right of franchise to cast their vote for the party which represents their immediate and final interest, the C. L. P. at all elections, being fully convinced of the utter futility of obtaining any real measure of justice or freedom under officials elected by parties owned and controlled by the capitalist class.' By the committee." Then the witness says: "The whole committee, I think." Then that is repeated by Mr. O'Connor, and Mr. Harris says:

"Miss Whitney's name appears with a number of others. Now, then, in lieu and in place of that, I understand you to say that this convention of the delegates did not accept this resolution, but accepted [fol. 368] another one. Is that correct?

"A. That is correct.

"Q. Will you tell us what one they accepted?

"A. They accepted the national report upon Program and Labor, which you will find in this paper."

And I think there is no dispute but that that is the report through which you carry this evidence to the jury.

Mr. Harris: Yes.

Mr. Coghlan: Mr. O'Connor says:

"That is in that box there." The answer is:

"A. Yes, Platform and Program of the Communist Labor Party."

Now, there it is evident that Miss Whitney did not subscribe to that but proposed another resolution. The record goes on to state (reading:)

"Mr. Harris:

"Q. Do I understand it is a page or a part of a page?

"A. No, we adopted the whole. The matter in that resolution deals with the political end only, and we made it very clear in our platform program all the way through that we wanted to add to that 'industrial organization' also. Now, the political phase of that is all right, but it did not include 'industrial organization.'

"Q. What I want to get at is that this whole matter, this whole Platform and Program, includes what?

"A. Includes an explanation of the whole industrial organization which we wish to embody as a part of our tactics.

"Q. What I want to get at first is this: There is no one paragraph, for it is not in concise form; it is interwoven throughout the entire platform, and you could not pick out any two paragraphs or any one paragraph, and read what you are trying to explain to us now. Is that what I understand?"

Now, I think the rest of it would not throw any light upon that matter; I think that I have somewhere a note which I should like a little later to call to his Honor's attentions, and yours, showing the vote of Miss Whitney upon that matter. Maybe I can strike that now, too—maybe. There is a long series of questions which your Honor will remember were objected to, and the objection was [fol. 369] sustained by Mr. O'Connor's objection.

The Court: I recollect that.

Mr. Coghlan: Someone was cross examining—

The Court: The Court afterwards struck out some, because the record showed the next day that it was not sufficient to sustain the Court's ruling, as I thought.

Mr. Coghlan: In other words, they were really allowed into the record; I think, or the substance of them, anyway, went in under your Honor's ruling later on.

The Court: They objected then that they were not cross examination, and added that objection or grounds to the objection in addition to the one already made, and on that ground the counsel, Mr. O'Connor, for the defendant, made the witness his own witness for several questions, as I remember, Mr. Coghlan.

Mr. Coghlan: Yes. Now I may still have that here; I will see. There is, of course, if the Court please, even from what I have read, but one inference to be drawn, and that is that Miss Whitney stood for the proposed resolution which was refused by the convention, and that it was her workings that brought it about as a part of the official conduct of that convention, the interjection of this Platform and Program of the Communist Labor Party nationally.

Now, the other referred to the count precisely, the matter that I desired to call your Honor's attention to. I probably left it on the other side of the Bay, and I am willing—or as I should say—we will be willing to submit the matter without any further comment. But I would like your Honor to read what I have in mind upon that subject before ruling—if counsel has anything else that he can offer at this time.

Mr. Harris: Yes, I have much to offer. That this resolution that you speak of does not say that political action is to be the only action, it only speaks of the value of political action. Apparently the members of the Communist Party felt that political action was to be laid to one side—this resolution does not say that there should not be the other kind of action. It merely says that the Communist Labor Party fully recognizes the value of political action

[fol. 370] as a means of spreading Communist propaganda; it insists that in proportion to the development of the economic strength of the working class, it, the working class, must also develop political power—it is just a suggestion that political power and political control go along with the other. But it does not eliminate the other by any means. There isn't one place in the resolution wherein or whereby they condemn sabotage, condemn industrial change by force or violence. They merely speak of the value of political action, and it should not be disregarded.

Mr. Coghlan: Of course, the answer to that is instant. There isn't anything in the platform of the Republican or Democratic Party that condemns sabotage, but we all condemn it, even some of us old liners condemn sabotage and don't believe in it at all. That, I think, is a complete reply to that. We cannot be charged with that—we have been charged now with nearly everything, and everything that you have wanted has gone into evidence, and there has been no reason for it, and all that; although we have disagreed with his Honor and yourself—but we cannot be charged with what we did not do. You cannot denounce this woman for what she did not say, and if she made no attempt to so frame this Party as to bring it within the regular paths that you and I have proceeded, in conventions which we have attended, that ought to be in her favor, not against her. And if you are now going to use this as a bridge, as you have referred to it, upon which to convey over the testimony that you offer from these witnesses, repudiated members, even, of the I. W. W. and informers, why, it seems to me that that is traveling entirely outside of any known principle of evidence.

Mr. Harris: I do not think that you will say yourself that she was not in the I. W. W. headquarters.

Mr. Coghlan: I am indifferent as to that. But if it is going to open a door here that has no place, why, we ought to object.

Mr. Harris: We feel that that is a circumstance that should be taken into consideration.

The Court: Well, it would seem to me at this time that the questions asked would be in the line of merely preliminary questions, would they not, for the purpose of showing some activity on the [fol. 371] part of the defendant?

Mr. Harris: We are going to follow it up by showing that there was a meeting then.

The Court: Then if you are going to follow it up with proof of some activity on the part of the defendant, all right. Then it is a preliminary question, Mr. Harris, I take it.

Mr. Harris: It is preliminary, at that. But we will show that afterwards there was conversation between this witness and Miss Whitney, and she agreed to do certain things for the I. W. W. organization. That doesn't concern anything preliminary, for that matter.

Q. Who was there, please?

Mr. Coghlan: Let me make a suggestion.

Q. Wasn't that the headquarters of the Defense Committee?

A. It was, Mr. Coghlan, and also the headquarters for San Francisco.

Mr. Harris:

Q. Who else was there?

A. At this time I speak of, James McHugo was there.

Q. James McHugo was there?

A. Yes, that was the same day the officers, Officer O'Brien and six police officers, raided the place, and kicked everything to pieces and carted Stredwick and I off to jail.

Q. Who was James McHugo?

A. He was secretary at the time of Oakland.

Q. Of what?

A. For the I. W. W.

Q. While you were there, did anyone come in?

A. While we were in the office?

Q. Yes.

A. O'Brien came in there, in the morning.

Mr. Coghlan:

Q. Do you mean while this lady was there also?

Mr. Harris: While Miss Whitney and you and James McHugo and this man Stredwick were there?

A. Yes; there was someone else with Miss Whitney, I don't recollect, but it was another lady. And O'Brien came in—this was in the morning—and O'Brien came in.

Q. Who was O'Brien?

A. He was a policeman in San Francisco—and asked for Stredwick, and Stredwick wasn't in, he had just left there, and I told him that Stredwick would not be back until five o'clock in the evening, and he came back at five o'clock and raided the place.

Q. Did you afterwards have a conversation with Miss Whitney?

A. Yes, I had another conversation after that. I had a conversation with Miss Whitney concerning the circulating of some Defense cards and letters, and also a circular that went with it.

Q. Defense cards for what?

A. There was a blue letter about that long, with an appeal.

Mr. Pemberton:

Q. Have you got that?

Mr. Coghlan: Have you?

Mr. Harris: No, sir, I never heard of it. This is the first I have ever heard of it.

A. They were about that long, and a small blue card that was numbered, that was to be used to remit funds.

Q. You say "Defense letters," defense for what?

A. For the defense of the I. W. W. prisoners in Sacramento.

Q. For the defense of the I. W. W. prisoners at Sacramento?

A. At Sacramento. Then there was a four-page leaflet that went with it, that purported to give a review—

Mr. Pemberton: Objection, as not the best evidence.

The Court: It may be sustained.

Mr. Harris:

Q. Have you that leaflet?

A. No, sir.

Q. Do you know where they are? Have you seen any?

A. I would say there should have been some in San Francisco. They seized enough of them; there should be some in San Francisco of those circulars some place.

Q. Very well. Were there any other papers?

A. No, that is all that went with that.

Q. What conversation did you have with Miss Whitney concerning—

A. We asked Miss Whitney—

Mr. Coghlan (interrupting): Just a second. Were these two papers of which you speak official papers of the I. W. W. organization?

A. Oh, yes, certainly.

Mr. Coghlan: Could I find out about what date this was?

Mr. Harris: Yes.

Q. What time do you think is the date of that, about?

A. I believe it was in the latter end of July or the beginning of August, 1918.

Mr. Coghlan: Of course, we object to any matter that remote, of course; the passage of this act occurred some time in 1919, didn't it? [fol. 373] Mr. Harris: Yes.

Mr. Coghlan: It is too remote, and not competent. And we contend, as far as this case is concerned—hearsay evidence entirely, and does not bear upon any of the material issues here, and it could not be chargeable upon anybody, including this defendant, whatever conversation might have occurred, however harmless or harmful it might be. And there is no foundation for it. It even antedates the passage of the act upon which this lady is being tried, and it is not competent, relevant or material and it is hearsay.

Mr. Harris: Our contention is, if the Court please, that it is immaterial whether it antedates the act, or not—to show intent, to bring her home in connection with the I. W. W. For instance, when this act was passed, McHugo was arrested and we could bring things that happened, that he had done prior to the passage of the act: no question about that, it shows the intent.

Mr. Coghlan: Isn't there a distinction between what somebody or some member of that organization, a professed member of that

organization did, and what this lady, professedly not a member, or admittedly not, may have said or done with relation to some incident of that kind? Can it be imported in here as a matter incriminating her, that if by reason of some charitable motive she contributed to the Defense fund, or assisted with some distribution, or letter, that was issued by that organization for the purpose of defending its members, that is not relevant, competent or material as against this person charged under this act, not as a member of that organization? It might be that I disagree with your Honor's fundamental ruling in the matter. That is a mere matter of disagreement between lawyers; it occurs every day. But this is very far away from your first ruling, which is to show what the general attitude of the organization called the I. W. W. is, what its general purpose was, what its example has been during the period of time while this act has been alive, and at the time when this announcement was made in the Platform of the organization—it seems to me that it is too remote. It will enable them to go back to the very roots of the I. W. W. organization; it will enable them to go to infinite lengths and with infinite thoroughness into any organization as throwing some light upon this lady's condition of mind—that, it seems to me, would throw no light upon her condition of mind, but possibly might show her to be curious as to those matters which pertain to citizenship. I object to the question as not competent, relevant or material, and on the ground that no proper foundation has been laid for it, and on the ground that it imports hearsay into the case, and that it is entirely too remote, and that it antedates the act.

Mr. Harris: It brings this element into the matter—they in one breath tell you no, she is a member of the Communist Labor Party but has no connection with the I. W. W.; they say absolutely there is nothing that tends to link her with the I. W. W. But when we bring her home to the I. W. W., when we bring her aiding and abetting and assisting them in their work, then they try to back up. I claim, if the Court please, that that is bringing home knowledge to Miss Charlotte Anita Whitney of the activities of the I. W. W. and her aiding them in circulating the literature for their defense. I consider that it is a circumstance to bring home to her, her relationship with the I. W. W. organization.

Mr. Pemberton: Once more, we don't know what this lady is being tried for. Is she being tried for being a member of the I. W. W., aiding, abetting or assisting them; or being a member of the Communist Labor Party, and aiding, abetting and assisting them?

Mr. Coghlan: The final responsibility is upon your Honor. I think our objection is good.

The Court: At this particular time, I do not feel that I want to rule on this objection. I would rather have it discussed further, and have more time taken on it. It is very interesting, and I should prefer to look further into it.

Mr. Harris: Very well, if your Honor please. I will pass it until such time as your Honor might suggest, along this line.

The Court: Could you look into it a little further, and if there

is testimony that you are about to bring forth from this witness, let us do that now and take the other up at another time?

Mr. Harris: I will refrain from conducting the examination along that line until your Honor is convinced that it is admissible. Yes, [fol. 375] your Honor.

Q. Do you know a man named Godfrey Ebel?

A. I do.

Q. What organization is he a member, or was he a member, of?

A. He belonged to the I. W. W. and was once secretary in San Francisco.

Q. And Frederick Esmond?

A. I know him, yes.

Q. What organization was he a member of?

A. He belonged to the I. W. W.

Q. Did he hold any official position?

A. No, he was a soap boxer, a lecturer.

Q. What do you mean by a "soap boxer"?

A. Well, I mean a street corner talker, a man that would stand up on the street corners and orate on the labor situation.

The Court: Ladies and gentlemen of the jury, you are about to be given a five-minute recess, and you are admonished at this time not to converse among yourselves or with any other person upon any subject connected with the trial of this case, or to form or express an opinion thereon until the case is finally submitted to you. Five minutes recess.

(At this point a short recess was taken.)

The Court (after recess, 11:35): Will counsel stipulate that all the jury are present?

Mr. Harris: Yes, your Honor.

Mr. Coghlan: Yes, your Honor.

Mr. Harris: Will you read the last question, Mr. Reporter?

(The Reporter reads the last question.)

Q. Do you know Miss Theodora Pollock?

A. I do, yes.

Q. Do you know what organization she was a member of?

A. She was a member of the I. W. W.

Q. Do you know a man by the name of Torrey?

A. I do, yes.

Q. Do you know his first name?

A. Albert; Albert Torrey.

Q. What organization was he a member of?

A. He was a member of the I. W. W. He was secretary at San Francisco.

Q. Do you know a man by the name of Safori?

A. I do.

Q. What organization was he a member of?

A. He was a member of the I. W. W.

Q. How long have you been a member of the Industrial Workers of the World?

A. Since 1905, since the inception of it.

[fol. 376] Q. And you know what sabotage is, do you?

A. I do.

Q. When did you first hear of sabotage in connection with the I. W. W. organization?

Mr. Coghlan: Of course, we object to that as not competent, relevant or material, and on all the grounds heretofore interposed to that line of examination.

The Court: It may be overruled.

A. About 1912.

Mr. Harris:

Q. When did you hear of it being in use first?

A. About the time of the Ford and Suhr trial, probably in 1913 or 1914.

Q. About the time of the Ford and Suhr trials?

A. Yes.

Q. At Wheatland?

A. Well, they were held at Marysville, it grew out of the trouble in the hop fields at Wheatland.

Q. You know what are commonly known as "cats" among the I. W. W.?

A. I do, yes.

Q. Did you occupy any position with the I. W. W. that enabled you to know the workings of what was termed "cats"?

A. Well, I was associated with them, yes; but there was no official position connected with it, no.

Q. Will you tell us how the "cats," as you term them, worked throughout the State?

Mr. Coghlan: Of course, we object to that on all the grounds heretofore interposed, and on the further ground that, a very obvious ground, it seems to me, that the knowledge of these things has to be traced to this defendant. One might even know nothing about the organization—a man may be a member and not know anything about such things. The knowledge of these things, and the acquiescence in them have to be proven. That, I believe, was decided very recently by the Court of Appeals. It is a general rule.

The Court: I would like to know just where we are leading to with this particular question.

Mr. Harris: I am trying to get—I am starting to show that the acts of the members of the I. W. W. had a finishing and a starting point with the secretaries, that they sent messengers out to the various men that they termed "cats," and that the messengers reported to [fol. 377] the secretaries of the I. W. W. what was going on throughout the State, as to what they were doing.

The Court: Would it be so much what they did, other than propaganda? We want the Propaganda and Example, I think.

Mr. Harris: That is the Propaganda and Example. It is even brought home to the secretary, *and the secretary*, and the secretary sending out what to do.

Mr. Pemberton: Do you claim that Miss Whitney was one of those secretaries?

Mr. Harris: That is not the proposition.

Mr. Coghlan: "Can you trace information to Miss Whitney?" I think is the question, and he disclaims it to be a fact that she is a member of the organization or intimately connected with it.

The Court: We have to remember the difference between the organization, as I said the other day, the organization that was on trial, so to speak, in this particular case, than that which was on trial in a former case recently tried here. In other words, we could show here, I take it, what the Communist Labor Party, if that is the proper designation, did through its members. But are we, by reason of this reference in the platform that we have alluded to so often during the trial of this case, allowed to go into the particular and specific acts of the I. W. W., an organization that is not on trial in this proceeding at all?

Mr. Harris: If that is all your Honor's ruling is—my understanding of it is, or my understanding was yesterday, that you wanted—and counsel very strictly emphasized the fact that individual acts by individual members of the I. W. W. could not for a moment be listened to. Now I am showing that the secretaries sent out their messengers to the Cats, and the Cats reported back to the messengers, who reported to the secretaries, about the places they had burned and so forth.

The Court: I have certain doubts about that.

Mr. Harris: Well, that the secretaries have knowledge.

The Court: The activities of those certain men, call them Cats or what not, if you can show that such activities were authorized by the organization as a part of their propaganda and the example that [fol. 378] they set, then, why, of course, you would have a perfect right to do that; but the question, after all, is to get this matter—if it is going to be put in evidence—of the action of the organization itself, I should think—or rather, we had better say, the example of the organization, not the action the example of the organization and its propaganda.

Mr. Harris: But we show that the secretary was in reality the operating head of the organization.

The Court: Well, if you could show that, that may be shown.

Mr. Coghlan: It will be admitted that a good part of the members of the rank and file of that organization knew nothing about these things. That is true, isn't it?

Mr. Harris: No, not by any means. They knew what was going on.

Mr. Coghlan: Might I ask that question out of order, your Honor?

The Court: Yes, you may.

The Witness: No, I would have to state, in all fairness to you that there were men who knew nothing about it at all.

Mr. Coghlan: The rank and file, I mean.

The Witness: The rank and file.

Mr. Harris: Yes, that is entirely possible.

Q. There was a special detail known as Cats, were there not?

A. Most assuredly.

Q. Is that not correct?

A. That is correct.

The Court: Was this the action of the order, of the organization, or was it the action not of the organization, but, we will say, of a clique, if that word will describe it—within the organization, and not authorized by the organization itself.

The Witness: Your Honor, may I quote the law of the organization on that subject?

Mr. Pemberton: What was that answer, Mr. Reporter? I did not understand it.

(The Reporter repeats answer of witness.)

The Court: I have no objection to your doing so.

Mr. Coghlan: The law of the organization?

[fol. 379] A. Yes, on that particular subject.

Mr. Pemberton: Let us all see it first.

A. You can get it—you have got an I. W. W. Constitution and By-laws there, have you not?

Mr. Coghlan: No, I have not; I just picked up this song book and I notice the preamble. Is that what you want?

A. No; you will find it in the Constitution and By-laws, that any action—

Mr. Coghlan: Have you got a copy?

Mr. Harris: No, I have not seen it.

The Court: Have you a Constitution? It may have been introduced in the McHugo case. I don't know.

A. Well, seven members of that organization constitute a quorum, and any action taken by any seven members is binding upon the organization.

Mr. Pemberton: So, then, that the organization of about seven thousand knew nothing about it?

A. The action of seven members makes a regular constituted and binding meeting.

Mr. Coghlan. I think I have got a Constitution of that organization, and I think we had better have it. I will bring it to you—Mr. O'Brien in San Francisco has charge of that detail, maybe he has got copies and I can borrow one from the Police Department.

The Witness: I might be able to find you one around here some place at noon, Mr. Coghlan.

Mr. Coghlan: Thank you, I wish you would.

The Court: Of course, many things asked in the questions propounded by the prosecution, I believe, would be allowable and could, of course, be brought forth from witnesses, if the organization that we are now seeking information about was on trial in the case.

Mr. Coghlan: Certainly.

The Court: But we have the Communist Labor Party here on trial rather than the I. W. W. organization, the Industrial Workers of the World, to be more specific.

Mr. Harris: I can readily understand that, if the Court please, but, under our same ruling, under your Honor's ruling—I am not [fol. 380] altogether clear because, under this platform and program which they adopted—I might ask merely for information—I personally do not know what your Honor's ruling would be on that question—would we be entitled to show that the I. W. W. organization adopted the third Manifesto, the same Manifesto that the Communist Labor Party did? We are going to attempt to do that, your Honor, but if your Honor says that line is not admissible, we will not do it, but at the same time that question confronts us: How far are we going to be permitted to go into this, your Honor?

The Court: Well, Mr. Harris, what purpose would it serve if this organization has already adopted that, if the organization did particularly adopt it? Why should we bother about what the I. W. W. did?

Mr. Harris: Well, it is part of the program and example of the I. W. W., which these people endorsed, and even adopted the Third Manifesto.

The Court: Is it propaganda and example rather than program? Propaganda is a doctrine that is spread and taught at large.

Mr. Harris: Well, if they adopted the Third Manifesto, isn't that part of their propaganda also?

Mr. Coghlan: On the same principle, we might say that all people who wear clothes could be connected. For instance, if a burglar was brought in here, and he wore clothes similar to some other party—how could that help us?

The Court: I would not think that any purpose particularly could be served in showing that the I. W. W. adopted the Third Manifesto. If this organization adopted it, it is proper, I take it, to admit it.

Mr. Harris: I do not understand the logic of the situation, I must say, your Honor.

The Court: What are we to do with it? Let's get down to argument, and clear it up right now.

Mr. Harris: Very well, when we come to it we will get down to it, because we are going to come to it, that is sure. The question—was there an objection to the question, Mr. Reporter?

(The Reporter reads back record.)

[fol. 381] Mr. Harris: There was an objection to the question, after which there was an argument a few moments ago, concerning the action of the Cats.

Mr. Coghlan: Yes, there was an objection, and it is that it is not competent, relevant or material, and it has to do with other persons. There is no tracing of the knowledge of any of this to Miss Whitney, and no foundation therefor. You see, we are really trying an organization. We are not trying several men; there is no charge of conspiracy here. This is a direct charge under the Syndicalism Act. Therefore, I suppose that they are or ought to limit

themselves to the consideration of just what is charged under that Act, to-wit: personal advocacy.

The Court: We must not lose sight of the information in this case, of course.

Mr. Coghlan: We have covered it up several times, and resurrected it again.

Mr. Harris:

Q. Mr. Dimond, what is the example set by the I. W. W. in regard to the treatment of people who they desire to get into the organization?

Mr. Pemberton: To which we object on the ground it is incompetent, irrelevant, immaterial, and calling for the conclusion of the witness, and is leading.

The Court: Let the question be read, please. (Question read.) I think that would call for the conclusion of the witness.

Mr. Harris: He was the secretary; he knows what proceedings are taken, your Honor.

Mr. Pemberton: Same objection.

The Court: The proceedings—that is not a conclusion—no, that would not be; that means what action was taken.

Mr. Harris: Yes, your Honor.

Mr. Coghlan: How were they inducted into membership?

The Witness: Is that question addressed to me, Mr. Coghlan?

Mr. Coghlan: As I understand, that is the purport of the question.

The Court: Let's see if it it—let it be read.

[fol. 382] (The Reporter repeats the question.)

Mr. Harris: No, that is not at all.

Mr. Coghlan: We insist on our objection—same objection.

The Court: I think you better re-frame it, Mr. Harris.

Mr. Harris:

Q. What action is taken by members of the I. W. W. organization in getting new members into the organization?

Mr. Coghlan: Same objection, especially the additional objection that it is irrelevant to anything charged in this Information.

The Court: I do not see right now the relevancy of it myself.

Mr. Harris: Well, that is part of the example that is set by them.

Mr. Pemberton: Why, that cannot be an example.

The Court: I do not see how that would be, the mere method or manner of doing it.

Mr. Pemberton: Doing something that is public—why, that can't be an example.

Mr. Coghlan: Well, after he became a member—that might have something to do with it.

Mr. Harris: Very well, we will take Mr. Coghlan's suggestion.

Q. After a man becomes a member of the I. W. W., what example is set, or what example is given out, in regard to his becoming a Cat?

Mr. Pemberton: To which we object as incompetent, irrelevant and immaterial, calling for the conclusion of the witness and the opinion of the witness, and it is leading.

The Court: I don't understand it.

Mr. Harris: Withdraw it.

Q. After a man becomes a member of the I. W. W. organization, how does he become a Cat?

Mr. Pemberton: Same objection, if the Court please, especially that it is absolutely irrelevant to anything charged in this Information.

The Court: I do not see the relevancy of it, Mr. Harris.

Mr. Harris: Very well, your Honor.

Q. What, if anything, is done to people who are asked to become [fol. 383] members of the I. W. W. and they refuse?

Mr. Pemberton: Same objection.

Mr. Harris: That is part of the example, if the Court please, that they set.

The Court: It may be overruled. You may answer.

A. In a great many instances they were beaten up and run out of that vicinity, and on other occasions lye was put in their shoes so that they would become crippled and have to go to the hospital, and have to leave that community.

Mr. Pemberton: Could I have the question read to which that is supposed to be an answer? (Question read.) I move to strike out the answer as not responsive to the question.

The Court: Let the answer remain.

Mr. Harris:

Q. While you were secretary of the organization, did you ever dispose of any I. W. W. literature?

Mr. Pemberton: To which we object, as to what he did. That is not binding upon this defendant.

A. Yes.

Mr. Pemberton: She is charged with doing it, but we haven't heard of evidence of it yet, none at all.

The Court: The general objection may be overruled.

Mr. Harris:

Q. What literature did you dispose of?

Mr. Pemberton: Same objection.

The Court: It may be overruled.

A. I have disposed of "Solidarity" and the "Industrial Worker", which were both newspapers, and quite a number of other pieces of literature that is put out in book form and pamphlet form.

Mr. Pemberton: May we ask when?

Mr. Harris:

Q. When were you secretary?

A. That would be in March and April, 1918, Mr. Pemberton.

Mr. Pemberton: That is long before this act was passed forbidding the distribution of literature.

Mr. Harris:

Q. In the distribution of this literature, what, if any, language was it written in?

A. It was written in the English language.

[fol. 384] Q. Was there any I. W. W. literature written in any other language than that?

Mr. Pemberton: To which we object on the ground that it is absolutely immaterial.

The Court: It may be overruled.

A. The only other paper—

Mr. Pemberton (interrupting): I don't understand that answer, please.

A. The only other paper that I ever handled was El Rebelde, that was printed in Spanish.

Q. In what language?

A. Spanish.

Mr. Pemberton: Is there any law against that?

Mr. Harris:

Q. Were you a member of the defense committee, to which you referred a while ago?

A. Yes.

Q. Who else were members of this committee?

Mr. Pemberton: Objection—incompetent, irrelevant and immaterial. There is nothing stated in the Information about a defense committee, and we still are groping in the dark. Is this lady being tried for being a member of the I. W. W., of some defense committee, or of the Communist Labor Party?

The Court: Well, still I do not see the relevancy of it.

Mr. Harris: Then we will pass it until we thresh that out.

Q. Do you know a man by the name of John Torrey?

A. No, I don't know him.

Q. Or Jacob Torrey?

A. No, I don't know him personally.

Q. Do you know a man by the name of Michael Cendrone?

A. No, I could not identify him at all.

Q. Were you ever present at a meeting of the I. W. W. organization in which Lambert was present and discussed sabotage?

Mr. Pemberton: Objection—it is hearsay, and unless it is shown that Miss Whitney was present, not admissible here.

The Court: It would seem to me at first blush to be hearsay.

Mr. Harris: You ruled on that question yesterday, as to what took place in the meeting.

The Court: We can have what took place in the meeting, yes, in [fol. 385] the meeting of the I. W. W., as to what their example or propaganda was.

Mr. Harris: I do not know what I incorporated that in my question—it was my error—pardon me, if the Court please. Read the question, will you, please, Mr. McSorley?

(The Reporter reads the question.)

Mr. Pemberton: Has the Court ruled on the question?

The Court: I should think that that ought to be allowed, just to show what the action of their meeting was.

Mr. Pemberton: I cannot understand, but I want the Court's ruling on that.

The Court: As I said, I think they should be allowed to show what action was taken in their meetings—not the discussion of it, but I would like to know what action was taken. Let him state what action was taken in their meetings.

Mr. Coghlan: What resolutions were passed?

The Court: What action.

Mr. Pemberton: We insist upon our objection.

The Court: I understand, but I think it would be proper to show what the action of any of the locals or branches of the I. W. W. was, and what they did in their meetings.

Mr. Pemberton: Then I understand that the Court overrules the objection?

The Court: Well, not in the sense that you put it, but I have directed the witness—or, rather, directed the counsel for the People what I desired, or I have indicated it, in other words.

Mr. Coghlan: Your Honor, as I understand—

The Court: Just a minute—in other words, the action of the organization, if it goes to establish the example and propaganda of the organization, that might be offered in evidence.

Mr. Coghlan: If the Court please, the organization, of course, does not act, except only through resolutions. Any sporadic instance of a speech uttered by a man like Lambert, where this lady was not present and had knowledge of it, is not chargeable to her, and would not be competent, relevant or material.

[fol. 386] The Court: I take it that any person who was present can tell what the action of the body was.

Mr. Coghlan: Well, that is true, if that is material; what the action of the organization was, though, has nothing to do with what Lambert might say about sabotage, unless it was followed by a re-

solution and that resolution would be the only way you could prove what the organization did.

The Court: The body being there present, whatever the proposition was before it, whatever came before it and was the action of the body, that is what I think the witness would have a right to testify to.

Mr. Pemberton: Have we really got our facts straight? Now, a convention which met in Chicago, in the nature of a national convention, adopted a platform that had some words that are construed here by counsel as an endorsement, or something or other about the I. W. W., without directly saying one word about the I. W. W. The organization with which Miss Whitney is claimed to be affiliated is the Communist Labor Party of California, and it just adopted, in general, terms, that Chicago platform, without particularly noticing those words perhaps. Now, they are undertaking to prove the example and propaganda of the I. W. W., which must, they think, have been in the minds of the National Convention at Chicago by somebody in San Francisco long, long ago, without ever tracing it, with regard to any such convention at Chicago, as having knowledge of it or to be Communist Labor Party at California, much less than to Miss Whitney, this defendant—if that is not the house that Jack built, I don't know what is.

Mr. Harris: The same gentleman, Mr. Lambert, there seemed to take a great deal of pride in the tenth convention, in commenting upon the fact that it cost the State of California eight million dollars, I think.

Mr. Pemberton: Well, that was not the convention of the Communist Labor Party; it was the convention of the I. W. W.

Mr. Harris: I thought that the Court ruled upon this about two weeks ago, and yet that is not impressed upon Judge Pemberton.

Mr. Pemberton: There is one thing that impresses Judge Pemberton [fol. 387] very clearly, and, as a gentleman of the press expressed it to me here this morning, you are trying this defendant for being obnoxious to the Police Department of Oakland.

Mr. Harris: I ask that statement be stricken out, and that Judge Pemberton be admonished in future not to make such remarks, regardless of what the press told him.

The Court: Let's get at it this way, if possible: If there was in that meeting that the witness's attention has been directed to any action taken in reference to the subject that you spoke of in your question, let the witness testify now, but not as to what was said pro and con on each side of the question—that I do not believe we are permitted to admit in evidence, as that would be hearsay as to this defendant now before the Court.

Mr. Coghlan: If your Honor rules that way, then the speech of Lambert which told about spending so many millions of our money would not be relevant.

The Court: Well, it would by reason of being circulated in these books, and by reason of it being in the book here; that would bring it within the law and permit its admissibility, as it was a resolution.

Mr. Harris: I do not yet understand what your Honor's ruling is as to whether we can go into this or not.

The Court: Well, you are asking for the discussion in the meeting.

Mr. Harris: Yes.

The Court: I don't think that that is material—or, rather, relevant, for the reason that I believe it is hearsay as to this defendant in this case. In other words, if we gather in this very courtroom that we are now in, in an assemblage, and if we were presenting certain propositions, I might have one side and discuss it from my point of view, and Mr. Harris and Mr. Coghlan from another, and Mr. Pemberton might be with me and concur with me and we might talk and talk for hours here; yet would our discussion be the action of this body? Wouldn't the action be what they adopted finally and what they concluded?

[fol. 388] Mr. Harris: You cannot get away from the fact that the fires took place, and you cannot get away from the fact that it has cost the State eight million dollars, I think.

Mr. Pemberton: And you cannot get away from the fact that that is outlawed, and that has nothing to do with the defendant in this case, and it is not forbidden by this statute you are prosecuting her on.

The Court: I think I have made myself clear on that.

Mr. Harris: Very well, your Honor.

Q. Did you ever see any phosphorus at the I. W. W. headquarters in Stockton?

Mr. Pemberton: Objected to on the ground it is too indefinite and uncertain, doesn't fix any time or it is not connected up in any manner with this case.

The Court: They have offered to connect that up.

Mr. Harris: I have asked him if he did. Then he asked me to fix the time. Then he will only say it is a leading question.

The Court: It may be overruled. There is a promise in here to connect the matter up, Mr. Pemberton.

Mr. Harris:

Q. When, approximately?

A. In June, 1918—no, 1917.

Q. Where?

A. I saw it in three places in the hall.

Q. Whereabouts, what three places?

A. One place under the sink in the washroom, and another place in a cupboard right across the hall from the desk, and in the third place in the baggage room.

Mr. Harris: Shall we take a recess until 2 o'clock at this time, your Honor?

The Court: Yes. Two o'clock, ladies and gentlemen of the jury. You are admonished at this time that it is your duty not to converse among yourselves or with any other person upon any subject connected with the trial of this case, or to form or express an opinion thereon until the case is finally submitted to you. Swear the officers.

(Officers sworn to take charge of the jury.)

(At this point a recess was taken until two o'clock p. m.)

[fol. 389] Mr. Pemberton: We now move the Court that in relation to the second count of the complaint, the prosecution be ordered and required to elect and designate definitely, in such manner as to the prosecution may seem best, what particular specific offense this shall be submitted to the jury under that count. To me, it seems that the best plan of doing so would be to describe in some way what book, paper, pamphlet, document, and so forth—and I call the Court's attention to the reading of that count:

"The said Charlotte Anita Whitney, prior to the time of filing this information, and on or about the 28th day of November A. D. 1919, at the said County of Alameda, State of California, did then and there unlawfully, wilfully, wrongfully, deliberately and feloniously print, publish, edit, issue, circulate and publicly display books, papers, pamphlets, documents, posters and written and printed matter containing and carrying written and printed advocacy teaching and aiding, abetting and advising criminal syndicalism."

And they have contended all along, and in one sense they are right and in another they are wrong—they are not bound to a specific date, but they are bound to some one specific act. Under this one count there could be a conviction of but one offense of this defendant in person, or through the hands of somebody else, if she was an accomplice, with any of these things, as to any one book, pamphlet, document, poster, or written or printed matter which is—first—when an offense is committed, and every time it was repeated, another distinct and separate offense was committed. If she distributed literature to me, every time she handed me a document, if the distribution of that literature was forbidden, she broke the law. And if she at another time even though there was only two seconds between, delivered to Mr. Calkins, again she broke the law. Now, there are introduced in evidence here some dozens of printed documents of which one of these is to be submitted to this jury as the particular document which she is charged with distributing, and editing, and publishing. We have a right to know that, because we must prepare instructions to the jury; and the Court has a right to know it, for the Court must give instructions to the jury; and the [fol. 390] jury has a right to know it, because it must convict upon one offense. And they must all agree on that one offense. If twelve documents were submitted, one jurymen may say that one document she did distribute, and another jurymen may say "No, she never distributed that one, but she did distribute this other one," and so forth, each one selecting a different instrument. So that no two of the jurymen would ever agree on any one of the documents. And what is worse than that, one of them may say "I am not convinced that she distributed any one instrument, but I am about one-third of the way convinced that she distributed each of, say, three instruments" and three-thirds make a whole number.

The principle has been invoked in many cases, your Honor. This

is not the first time I have invoked it myself, by any means, and I have never known it to be refused in this State—that is, within my own observation—I have the records here where it has been refused, but the cases have been reversed on it every time. Let me take the latest California case—I haven't the volume, but I suppose it is in the library downstairs, in the volumes of the California Reports—it is the case of the People against Elgar 36 California Appellate, 114:

"But the Court instructed the jury that 'it is not incumbent upon the prosecution to prove the exact time and place when the offense for which the defendant is being tried occurred; it is sufficient if the prosecution established the commission of said crime beyond a reasonable doubt, at any time within three years prior to the filing of the information in this case, which information was filed in this Court on the 8th day of August, 1917.' This instruction was erroneous. Its subject-matter comes directly within the strictures passed under a similar instruction in *People against Williams*, 133 California, 165, 168, (65 Pacific, 323, 324), and see, also *People against Harlan*, 29 California App. 600, (156 Pacific 980), although in that case there was evidence of many illicit acts"—quoting from the *Williams* case:

"A verdict of guilty could have been rendered under such an instruction, although no two jurors were convinced beyond a reasonable doubt, or at all, of the truth of the charge as to any one of these [fol. 391] separate offenses. Even worse than that was possible. As to every specific offense which there was an attempt to prove, and which could be met by proof, the defendant may have established his defense, and yet upon the general evidence of continuous crime, which, in the nature of things, he could only meet by his personal denial, he may have been convicted. And how could he defend, when he was not informed as to what particular offense, out of hundreds testified to by the prosecutrix, he was to be tried? In this case, as well as in any other, prosecution must charge a specific offense, and the conviction, if one is had, must depend upon the proof of that offense alone. Other incidents are important only as tending to prove the one specific offense for the alleged commission of which defendant is on trial."

Then it cites those instructions, and it was held that it cured these errors—that it did not——

The Court: What is the volume?

Mr. Pemberton: 36, your Honor.

The cases have come up mostly where the crime charged was rape because that is one of the exceptional cases where with a number of different offenses evidence may be given regarding a number of different places—but the same rule has been applied by the Court and counsel in this case, and if the proper foundation were laid, correctly so.

I am assuming now, for the purpose of this motion, that all this

evidence is properly in. There is just as much evidence about any one of a dozen different instruments as there is about all of them, or any of them, or any other of them. Now, it is true that if she handed two documents out at once, there would be but one offense. But we are entitled to know what two, and the District Attorney is not bound to assert that each of them is—he can pick his strongest point, that is his privilege, but he must pick and choose, and must submit to the jury only that one—so far as their verdict is concerned. I have cases in embezzlement also where the same rule applies. In order to show intent, to negative the proposition called for by the presumption of innocence, that it was an oversight, and [fol. 392] so far as embezzlement is concerned, I have others involving different counts on different subjects. The principle is the same throughout, whenever there is enough evidence introduced tending to show that more than one offense may have been committed.

There is another reason that I have not urged, but that must be taken into consideration in this case: whether or not, if it be political action—that it is claimed a certain act was, which is defined by the—or rather, which is prohibited by the statute; for instance, whether or not it is a political change that is advocated, is a question of law for the Court, and if they point out the document that indicates a certain change, it is for the jury, perhaps, to say whether that document so does—it is certainly for the jury to say whether or not she distributed that document; but it is for the Court to say what constitutes a political change. And we are entitled to have an instruction from the Court, and not leave the jury to guess at it, and an instruction which definitely covers the question.

Now, *People against Harlan* was cited in the case I have just read. It goes into the question more fully, and again it is a question of rape, 29 California Appellate, page 600.

(Hereupon counsel reads 29 Cal. App., page 600.)

In *People against Williams*, 133 California, at page 165, Justice Temple of the Supreme Court, in discussing a question similar to that here involved, said—and I will read the case:

(Hereupon counsel reads *People vs. Williams*, 133 Cal. page 165.)

There is a California case, 133 Cal., page 165, *People against Williams*, your Honor, where it says that it must appear that the crime was committed before the indictment was found, within the period of limitation.

Mr. Calkins: What was the character of the crime charged?

Mr. Pemberton: The same character. But I will get some that are not of that character. I was just interested in making a classification of the cases. The rule applies to all cases wherein one is, for any reason, allowed to prove more than one specific offense.

Mr. Calkins: That is a pretty broad statement.

Mr. Pemberton: Well, it is a question of principle; there is nothing technical about this, and the statement is none too broad,

[fol. 393] and will be borne out by the cases I will cite. Why not? In embezzlement, in addition to proving the specific act relied upon, in order to prove intent, or a course of proceedings—like acts may be proved. Now, in this case, the Court has allowed all these documents to go in. Which one are we being tried for? That at least we are entitled to know; that at least the jury is entitled to know; that at least the Court must instruct upon.

Mr. Coghlan: Would you let me interrupt you please? The case has been continued so that Miss Whitney may go now, if she desires, your Honor? This matter which is being brought to the Court's attention by counsel will have some bearing upon the Court's ruling, and the presence of the jury has not been required, and it has been locked up for the night and the case continued regularly. So that, Miss Whitney, if you want to go now, I guess you may.

Mr. Harris: We will say that if there is any technicality to waive, that you would waive it, would you?

Mr. Coghlan: Surely, surely.

Mr. Harris: Under those circumstances, we would be glad to convenience Miss Whitney.

Mr. Coghlan: The absence of Miss Whitney could not be raised. There is no technical possibility. But any irregularity, if there be any, is waived also by you, Miss Whitney?

The Defendant: Yes, sir.

Mr. Harris: Your assurance is sufficient.

Mr. Pemberton: Now, the authorities I think are uniform upon this question, and uniform on the principle, and uniform on the question of applying it to every kind of case in which for any reason different offenses may be shown by the evidence. But they do vary a little bit as to procedure, as to when is the proper time for the election to be made; some say the prosecution must make it at the beginning. I think, however, the rule laid down in *People against Harlan*, 29 California Appellate, page 600, is the latest rule in this State, and the fairest one that must be applied.

The Court: Oh, yes. I have that 29 California.

Mr. Pemberton: "The Court should, at the stage of the proceed-[fol. 394] ings when demanded by defendant, have required the prosecution to make an election between said acts."

That is *People against Harlan*:

"The Court should, at the stage of the proceedings when demanded by defendant, have required the prosecution to make an election between said acts."

In most states, and for good arguable reasons, the very latest time is at this time, when the prosecution submits its case, and its evidence, at that time, after there has been testimony introduced that might tend to prove the commission of different offenses. Now, I will cite the case of *State versus Powell*, 1905, in 105 Northwestern, page 717. That is not a case of rape at all. The defendant there was convicted of the offense of keeping and maintaining a nuisance in violation of provision 7615.

(Hereupon counsel cites above case.)

Mr. Pemberton: Bootlegging in a barn, of course in that case they could introduce several acts, because it is a continuous offense, the maintaining of a nuisance. But they must elect as to which nuisance they must attack.

(Discussion.)

The Court: In that case, did they permit the prosecution to show more than one sale in each of these buildings?

Mr. Pemberton: Yes; the evidence tends to show that the defendant sold liquors in each of said buildings, and permitted persons to resort to each of these buildings, for the purpose of drinking intoxicating liquors during the time covered by the information. It is not held that there was any error in permitting the evidence, but there was error in refusing to require the election.

Now, in *Gile versus State*, a Nebraska case, reported in 168 Northwestern at page 567, the syllabus is by the Court, so I will read the syllabus, your Honor.

(Hereupon counsel cites syllabus of above named case.)

It was to require the State to elect upon which one of the several acts he intended to rely for the conviction; the particular case dwells more upon the question of when the State should be required to elect, but that is a question of procedure that I think is covered in [fol. 395] this State in *People against Harlan*, to do so when the defendant demands it. And practically all the cases say it must be done not later than at this stage of the proceedings.

From the same volume, 168 Northwestern, at page 749, I take the case of *State versus Yeager*, which is not a crime involving any sexual offense.

Mr. Calkins: What is the page of that?

Mr. Pemberton: 749, *State versus Yeager*.

Mr. Calkins: I said what report.

Mr. Pemberton: I was mistaken as to which this is; this is another case involving a sexual offense. It covers the same point.

The Court: Is this the same case you have already cited?

Mr. Pemberton: No, this is another case.

The Court: May I ask for the citation again?

Mr. Pemberton: *State versus Yeager*, 168 Northwestern, page 749.

(Hereupon counsel reads *State versus Yeager*.)

Mr. Pemberton: A defendant cannot be tried for two crimes under a charge of one, neither under the claim that time is immaterial can the State switch from one act and rest its case upon proof of another act. If there has been no error in the information I will read the rest of it.

(Hereupon counsel continues to read above citation.)

I had another case in my list, but it will take too long to read all of these cases—one of which involved cruelty to animals. There

were several counts of cruelty to animals, and there were several counts, and evidence was given extending over long periods as to keeping them in unsanitary and improper places, and they laid down the same rule there. I could find the case, I have it in my list, but I am not able just at this moment to pick out which one it is. It is quite a recent case, however.

Mr. Calkins: A California case?

Mr. Pemberton: No, it is not a California case. I have this on my list—this may be the case—I have this quotation from a case, a recent case, in the Federal Reporter, a Kansas case, decided in the last four or five years, 146 Pacific, page 1145. I am not sure whether [fol. 396] this is or is not the case, where it was a charge of cruelty to animals.

(Discussion.)

Mr. Pemberton: Now, we submit that this is a vital, substantial right of the defendant, to which the defendant is entitled at this stage of the proceedings, your Honor.

Mr. Calkins: There is one thing which caught my mind immediately upon the presentation of these authorities by counsel, and that was that the cases all cited had to do with acts which in their nature were complete at a specific moment, such as the act of rape which is of course inclusive only of one single act, and must be complete at a definite time; it is not in the nature of what might be called a continuous offense, and there is much that counsel cites that falls short. There are necessarily a great many crimes which occur, begin and end within a short space or period of time, but no such crime as rape—and I would call the attention of the Court to the case decided in 168 Northwestern, page 567, with respect to incest, in which the Court said "It was not the continuous course of incest charged, but specific acts of incest and therefore it brings it within the same rule as applies in these cases of rape." There of course were charged a great number of instances of the commission of the crime of rape. To be proved there must be one which is the offense charged to the defendant—it would be really immaterial if he were charged with a course of rape, for instance, if you can imagine such a charge, if you can imagine a statute which provided a punishment for a defendant for a course of rape continuing over a period of time, then, of course that rule that counsel cites would not apply and the singleness of the act would not have to be indicated. Your Honor will doubtless call to mind the cases of contributing to the delinquency of a minor child, where the contribution to the delinquency consists in a course of living in immoral surroundings for a period of time, or of immoral practices upon the part of the parent of the child, we will say, for a period of time, in which case they could never pick out a day on which that parent was found living in those surroundings.

Another case which would suggest this to your Honor's mind would be the case of adultery under our statute, the forbidding of [fol. 397] the open and notorious living together—

The Court: That is not notorious any more. They have stricken

that word "notorious" out. It becomes notorious by its very nature, under its designation, so it is unnecessary.

Mr. Calkins: Well, living in a course of adultery. There the proof, of course, was not the single day on which the defendant or the defendants, if joined, were found living in a state of adultery, but a continuous living of married persons together, not married the one to the other, but married to other persons, the two living together in this adulterous fashion, so that no particular day in those cases would ever be selected.

Now, this nuisance case: there the charge, the case shows that the information charged bootlegging in a certain definite building, it said in a certain building on certain premises; but there appeared to be two places, and the Court said "Since the charge is as to a certain one, it must be selected as to which one." But suppose that this man had conducted his bootlegging in a wagon with a team of horses, and it was shown that he hauled it from place to place throughout the country, selling it, it wouldn't be necessary to take the particular corner at which he stood at a given time and made a sale.

The Court: In other words, there are so many sales which might be offered in evidence, that on that theory I would afterwards be compelled, as the prosecutor, if I were such, to describe the particular sale.

Mr. Calkins: I believe that would be true. But it certainly would be true under that statute which indicates a continuous course of conduct as the adultery statute or the contributing to the delinquency of a minor statute.

(Discussion.) *

Mr. Calkins: It is something like this: we get down to this more or less ridiculous situation. We will suppose a case in which Mr. Pemberton—and which I don't think would happen, and which I sincerely trust would not happen, but it might—that Mr. Pemberton, in a moment of excitement, swung upon me and struck a blow, not one blow, but set upon me and beat me up with a number of clouts—I suppose that my friends in the District Attorney's office, in order [fol. 398] to convict him would have to pick out one of those blows as having landed on my nose, or some other place, to convict him by proving that that one particular blow struck me, and the Court would have to instruct that the District Attorney select the blow; yet I really think that that is not the case. The fact is that the assault continues from the beginning of the act, even though it may continue over a day with me, running throughout all the time until its completion; and so it is with numerous crimes. But these cases that have to do with crimes which must end definitely, such as this crime of rape, or the crime of incest, where a specific act is the basis of the charge, it is reasonable to make a selection. But I fail to see how counsel's argument has any application here to anything which, by its nature is continuous, being the same, being the thing which you might cut it down—if we are going to be logical and follow out counsel's contention, if I am charged with being something, why, you might say that the District Attorney had to pick out the par-

ticular second of a particular minute of a particular hour of a particular day of a particular month—and there would be no limit to the extent of logical reasoning that might follow. It is on the same distinct lines in a continuous act—if a continuing act or a continuing series of acts make up the offense, then it is not necessary to designate any one of the continuing series. If it is a single act in itself, which constitutes the evidence, then that probably should be the one selected. So far as this proposition of handing out books is concerned, suppose that if I have a pile of books here and hand them one by one to Mr. Pemberton, that under his theory each one of these is a separate offense, but under my theory that is a distribution, and it doesn't make any difference whether I hand out three consecutively, or three together.

Mr. Pemberton: It is all part of one act. You are right. It is continuing, and there need not be a selection of the particular book, if I hand him a Bible at one moment, and what he seems to regard as an offending document, the Third International, with the other, I cannot see that that amounts to anything but a continuing act of distribution.

Mr. Calkins: I presume Mr. Pemberton will accuse me of being dense, but I really think that a distinction must be between a continuous course of conduct or state of affairs, and the act which is by its [fol. 399] nature complete at a definite moment.

Mr. Pemberton: If the Court please, Mr. Calkins has grasped the point, but he has failed to apply it. He is right about continuing offenses, but neither the statute nor the information in this count has the least reference to a continuing offense, the only regret I have is that Mr. Rogers does not listen to everything you say about this information, because I am sure, he having drawn it, would indeed appreciate it.

(Discussion.)

Mr. Pemberton: I am not arguing on the information now, or its sufficiency. I am arguing on this motion. This is a hard statute to draw an information under, and I don't want to be harsh in my criticism.

The Court: We will take it that you are not, Mr. Pemberton; you first came into court and announced that in your judgment it was pretty well drawn.

Mr. Pemberton: So far as a continuous act or the conditions contemplated by the clause in this act, which we are now referring to now, are concerned, and by the information she is alleged at a certain date to have circulated documents teaching criminal syndicalism. What the documents are I don't know, and I don't know that they are confined to one motion of the arm, nor to one particular document. If they want to contend that a number of documents were circulated, all right. But if they contend that they are also they must prove them also. And there is but one act contemplated by the statute and by the information. There is nothing continuous like in this case, like maintaining a nuisance or living in adultery it is one complete act, completed, and the law—

Mr. Calkins: Pardon me a moment. At what particular moment do you organize, come to think?

Mr. Pemberton: I am not talking of that count. I have explained—I have been talking about the second count all the time. I have never said a word about any other up to this time.

The Court: That is right. You said the last four counts, taking up the second count first.

[fol. 400] Mr. Pemberton: No, I am not criticizing now the times of any other, or which offense, referring to a particular act, is relied upon for conviction under this one count. That is the question we are entitled to have answered.

Mr. Coghlan: There might be some supplemental motion made as to the counts on the evidence that has been offered as to some of these counts—but speaking, however, informally, about this information, it is certainly the most marvelous document that has ever been drawn of its kind. I believe that nothing could have been better done, for a District Attorney, than this information. It teems with proof of nearly everything else in the world.

Mr. Pemberton: We submit the motion, as far as the second count is concerned.

Mr. Coghlan: It is perfectly good pleading, from the standpoint of the pleader.

The Court: Are you going to talk further on anything in regard to this motion, Mr. Harris?

Mr. Harris: I am willing to have your Honor rule on this motion.

Mr. Calkins: I have nothing further to say. I have been wondering, merely, what procedure counsel would have us follow if we agreed with his argument.

Mr. Pemberton: I have suggested what I thought would be the best method of meeting our motion, and that is to indicate the particular document. But I don't think I have the right to dictate—that will give us the needed information, and we will have to accept that.

Mr. Coghlan: I think that a motion to direct the jury under Section 1118, if we have any further motions to submit along the lines of this argument, I imagine from the brief conference that I have had with counsel, that we will direct ourselves to the question of whether or not that advice to the jury ought to be given under certain of these counts, so that the argument of this matter may be narrowed down to such limitations as your Honor sees fit.

Mr. Pemberton: That is one of the necessities of the motion.

Mr. Coghlan: That section virtually picks up the idea of this case negatively. It takes in an action where a number of charges are set forth in an information. In any event, it would be compul-[fol. 401] sory—your Honor will compel election in the event that some of these five counts were not deemed to have been at all sustained by a direction to the jury advisedly, of course, to the effect. So I think that we haven't lost time.

The Court: No. I have in my mind the case of the nuisance that was offered here, and we have a person engaged in the illicit selling of liquor with two buildings on the same premises, and made sales

of various liquors there. A good deal could be said under those decisions that we would have to specify the particular sale or the particular brand of whiskey—

Mr. Pemberton (interrupting): Not the sale, but the particular place.

The Court: Yes, the particular brand sold.

Mr. Pemberton: The particular place was the rule.

The Court: Yes. Just a minute. I can see that analogy to those cases, yes; but, really, I don't see the analogy of this case to the cases of rape.

(Discussion.)

The Court: Perhaps the question would be whether it was rum, beer, or whiskey.

Mr. Calkins: The question in that nuisance case would be which drink went to the jury. (Laughter.)

The Court: I really believe that the motion should be denied, but I will not make the ruling until to-morrow morning.

Mr. Pemberton: I will not argue it, but I wish to submit the same argument in regard to the motions on the other counts. The third count alleges that the defendant did, at the date named, unlawfully, wilfully, deliberately and feloniously by spoken and written words, and by personal conduct advocate, teach, aid and abet criminal syndicalism, and we now move the Court to require the District Attorney to elect what spoken or written words, and what personal conduct is to be submitted to the jury to be relied upon by them; and the fourth, on that count we submit it upon the argument made upon the others.

The Court: Let that be submitted. Then we will take the rulings all together tomorrow, on the four.

Mr. Pemberton: Well, on the fourth, it attempts to charge this [fol. 402] defendant with "by spoken and written words did justify and attempt to justify criminal syndicalism"—by spoken and written words, or spoken or written words, and in regard to that we move the Court to require the District Attorney to elect and designate and inform us what spoken and written words are to be submitted to the jury, or spoken or written words, to that count.

The Court: The same argument as to that, then?

Mr. Pemberton: Yes. Now, on the fifth count. "Did then and there unlawfully, wrongfully, wilfully, deliberately and feloniously by person acts and conduct practice and commit acts, advised, advocated, taught and aided and abetted by the doctrine and precept of criminal syndicalism." Now, what specific act or acts are relied upon for a conviction under that count? We move the Court to require the District Attorney to elect and designate so that we might know what we might have to meet and what is to be submitted to the jury, and what the Court should instruct the jury on.

The Court: Let that go with the others, over to tomorrow morning. Now, as to the first count.

Mr. Pemberton: Now, I am inclined to think, to be fair with the District Attorney, that perhaps the election is already indicated under the first count. Let's see if we agree upon that. Now, in this State under the authorities, especially of People against Williams, the

election may be indicated by the act of the District Attorney, on submitting the case—the order in which he submits it, and the importance and consideration he places upon it. Let me say this, then: we have for the aggregate the chain of facts followed up under the first count, are these: that in 1914, or thereabouts, as a means of and for the purpose of securing the pardon of two persons, one named Ford and the other named Suhr, members of the Industrial Workers of the World, committed acts of sabotage consisting of burning haystacks and barns. Following that course of said conduct, at Chicago some time about August or September of last year, the National Convention of the Communist Labor Party made a reference commendatory of the Industrial Workers of the World. The State Convention in California on the 9th day of November, 1919, adopted [foi. 403] and made a part of its Platform, the Platform of the National Convention, and Miss Whitney, it is claimed, is shown by the evidence to have become on that date a member of the State Party. I have correctly stated your theory as I understand it from your conduct of this case.

Mr. Calkins: It is always illuminating to get somebody else's understanding of the theory—I don't feel that there is anything which now compels me to analyze your version of my theory.

Mr. Pemberton: If that be not correct, then I move the Court to require the District Attorney to state what facts or chain of facts are relied as establishing Miss Whitney's connection with any acts of sabotage or any other acts forbidden by the statute under that first count.

Mr. Calkins: I shall have to submit that to the Court.

Mr. Harris: He will learn that from Mr. Calkin's argument, I am sure—very, very surely and distinctly.

(Discussion.)

Mr. Pemberton: We have given the Court our understanding now of the application of *People versus Williams* to this case, so unless we are wrong, they are estopped to question our understanding of it hereafter. That is common fairness.

Mr. Harris: Well, what is your next point? Or is there any next point? Are you through?

Mr. Pemberton: Just wait a minute.

We move the Court to direct the verdict, direct the jury, rather, to bring in a verdict of "Not Guilty," because of variance. Now, we will submit that without argument.

Mr. Coghlan: The suggestion is that we submit that later, because I think at this time it would be untimely.

Mr. Harris: I know, but Judge Pemberton does not feel that it is untimely, so let's have it.

Mr. Pemberton: No. The written instruction, the authority I wish to submit, is the one I just read from. The question is what particular incident was in the mind of the attorney when he drew the information—the information charges something on the 28th. The date is not very material, as stated in *People versus Williams* "A variation from that date as a variance, but generally not a prejudicial

[fol. 404] or fatal variance." But there is no other identification than the date there.

Mr. Coghlan: Don't put of record a motion to direct. It may be you know, that the defense will want to help out the prosecution that much. We don't object to everything they have got.

Mr. Harris: What is this? Is one counsel now withdrawing the motion which the other counsel has already made?

Mr. Pemberton: Well, we will withdraw it, with the privilege of renewing it later, your Honor.

The Court: Very well. Ten o'clock tomorrow morning, gentlemen.

(At this point an adjournment was taken until ten o'clock a. m. of Thursday, February 19, 1920.)

Thursday, February 19, 1920.

The Court: People against Whitney. Will counsel stipulate now that the jury is all present?

Mr. Harris: So stipulated for the People.

Mr. Coghlan: Yes, your Honor.

Mr. Pemberton: Is the Court ready to rule upon the motions made by me?

The Court: Yes. The several motions presented to the Court yesterday afternoon may now be denied.

Mr. Pemberton: Now, if the Court please, in regard to this count, the reporter quite naturally, understanding what I said at one time, as part of the argument—but it was not so intended by me—has not taken it down and it is not transcribed in the record. Therefore, I wish now to have the matter corrected. I made a statement in substance, as follows, regarding the first count.

The Reporter: I took it down but did not put it in the transcript, as it was argument.

Mr. Calkins: Can't we put this in at some time, when it is not going to consume the time of the Court and jury—or at least make a statement as to the conditions in which it was made previously.

Mr. Pemberton: If I had not been interrupted, Mr. Calkins, [fol. 405] would have been through by now.

Mr. Calkins: When you start, I cannot prophesy these things.

Mr. Pemberton: In regard to the first count, I made a statement, in substance, as follows: Applying the principles laid down as we understand it, in People against Williams, to this case, the District Attorney is deemed to be presenting to this Court and this jury under the first count, the following series of facts—

Mr. Calkins: Now, if your Honor please, I know your Honor heard that series of facts and knows that it was a considerable statement, and it is simply the guess of counsel which I do not think it is proper for him to put forward at this time.

Mr. Pemberton: I think it is very necessary.

The Court: I suggest that it could be done in chambers, just as well, could it not?

Mr. Calkins: We will stipulate it may go into the record.

The Court: Well, ladies and gentlemen, you are excused for five minutes. You are admonished now that it is your duty not to converse among yourselves or with any other person on any subject connected with the trial of this case, or to form or express an opinion thereon until the case is finally submitted to you. Five minutes.

(A short recess taken.)

Mr. Calkins: I am ready whenever the Court is.

The Court: Yes, I am. Go right ahead.

Mr. Pemberton: Under the rule in the Williams case, it now appears to us that the following state of facts is relied upon, under the first count of this information: I am stating them chronologically—about the year 1914, certain persons alleged to have been members of the I. W. W., or the Industrial Workers of the World, permitted certain acts of sabotage in Stanislaus County, and other portions of this state, intending thereby to so terrorize the Governor of the State of California and to use it as a means to prevail upon the Governor of the State to pardon certain persons who were under sentence of life imprisonment, to wit: a person named Suhr and a person named Ford. That at the meeting of the National Convention about last August or September, the Communist Labor Party at Chicago, Illinois, used words endorsing the Industrial Workers [fol. 406] of the World, that the State Convention held in this county on the 9th day of November, 1919, the State Convention of the Communist Labor Party adopted the National platform or the platform of the National Convention, and that Miss Whitney on the last named date, became a member of the Communist Labor Party of California. Now, if I am in error in any of this, would request the Court to direct the counsel upon the other side to state what facts they do, or what series of facts they do choose to submit to the jury upon this count.

The Court: It was for the purpose of the record, as I understand it, Mr. Pemberton, was it not—that statement that you have just made?

Mr. Pemberton: And that is also for the purpose of getting a ruling, and a statement as to what this jury is trying.

The Court: I understand that that was one of the motions made yesterday.

Mr. Pemberton: Yes, I was repeating it now, because it was not written up into the transcript.

The Court: Yes, and as I said, let that motion be denied. Call the jury.

[fol. 407] Miss CHARLOTTE ANITA WHITNEY, the defendant, called as a witness in her own behalf, being first duly sworn, testified as follows:

Direct examination.

Mr. Coghlan:

Q. Miss Whitney, you are the defendant in this action?

A. Yes, Mr. Coghlan.

Q. You stand accused, in other words, five times under the act defining syndicalism?

Mr. Harris: Mr. Coghlan, would I be asking too much if I asked you to stand at this side? I cannot hear the questions that go between you and the witness, and I would appreciate it very much.

Mr. Coghlan: Would that be satisfactory?

Mr. Harris: Yes, so long as we can hear—anything satisfies us.

Mr. Coghlan: Well, I am willing to do nearly anything that you suggest.

Mr. Harris: I suggest that you don't get between the witness and ourselves, then, if you will accomodate us, and we know that is your desire.

Mr. Coghlan: It is, indeed.

Mr. Harris: We thank you in advance. We knew that we did not have to call your attention to it the second time.

Mr. Coghlan: It is exceedingly courteous on your part, and deeply gratified to hear from you in that regard.

Q. Well, now, let's get to the business of the case, then. Miss Whitney, you are charged in the several counts with substantially the same thing, with the advocacy of syndicalism, the advocacy of violence, with the advocacy of crime, and with joining an organization that advocated that sort of thing. Now, I call your attention to the convention of November 9th, I believe it was, at Loring Hall in this city, if I am not mistaken—did you utter anything at that time and place that savored of terrorism, that advocated violence, or intend the commission of any crime through the medium of this organization?

[fol. 408] Mr. Harris: Just a second. If the Court please, we object to that upon the ground that it is leading and suggestive, and it calls for the conclusion of the witness. She may tell what took place there, but what savored of this or that and so forth, is not material.

The Court: I rather think you had better reframe your question.

Mr. Coghlan:

Q. What did you say at that convention, Miss Whitney?

A. I made a report at the morning session of the Credentials Committee—I think I did not speak—to any motion. But I did at the

evening session read a resolution which was presented by the Resolutions Committee.

Q. Yes. What was that resolution?

A. It was a resolution, if I remember rightly, defining the attitude of the Communist Labor Party of California to political action.

Q. Was that resolution carried?

A. That resolution was not carried.

Q. Did you do anything else at that particular convention, Miss Whitney?

A. I was a member of the Resolutions Committee, and I attended the conference every morning until it closed in the evening.

Q. And now then what did you understand to be, or know to be, rather, the meaning of that organization that occurred on November 9th at Loring Hall?

Mr. Harris: What is the question, please?

(The Reporter repeats the question.)

A. It was a convention to formulate the principles and to put into existence the Communist Labor Party, a political party for California, to be a branch of the National Communist Labor Party.

Q. Was it to be, or did you intend that it should be an instrument of terrorism?

A. No, sir.

Q. Or of violence?

A. No, sir.

Q. Was it your intention or the intention of the convention, as far as you know yourself, to violate any law of this country or State?

Mr. Harris: Just a second, if the Court please, to which we object upon the ground that it calls for a conclusion as to what her intention was.

The Court: As to what she knew——

[fol. 409] Mr. Coghlan:

Q. Did you or did you not know whether or not it was the purpose of that meeting to violate any known law?

A. I knew it was not. The meeting was an open convention.

Q. Yes.

A. (Continuing:) And would not, of course, have been an open convention if we were deliberately planning to break the laws of the State in which we live.

Q. You have lived—where do you live, Miss Whitney?

A. I live in Oakland.

Q. And for how long have you lived here?

A. About 40 years.

Q. You are a native of this state?

A. Yes.

Mr. Coghlan: Does counsel now wish to examine this lady?

Cross-examination.

Mr. Harris:

Q. Miss Whitney, you did, at this meeting in regard to a resolution of the committee on which you were working, submit a resolution to the effect that you would use all force that was possible to free class war and political prisoners, is that not correct?

A. I could not be sure of the wording, Mr. Harris, of that resolution. I don't know how, just how it was worded. I think that is not correct, however.

Q. You are a member of the Communist Labor Party?

A. I am.

Q. You are?

A. Yes.

Q. You are acquainted with Herbert Stredwick, who is in the penitentiary at Fort Leavenworth, are you not?

A. Yes.

Mr. Coghlan: Just a minute—don't answer that question. We object to that as not relevant, competent or material, and not proper cross examination.

The Court: Not unless it is for preliminary purposes, it is not cross examination. The answer may stand, though, if it is preliminary.

Mr. Harris: I meant to follow that up by asking whether or not she considered Stredwick a political prisoner at Fort Leavenworth. If that is not material, all well and good.

The Court: The answer may stand.

Mr. Harris: I will get the language of this question concerning which I asked you.

Mr. Coghlan: Let's see the resolution.

[fol. 410] Mr. Harris: I am getting the language of it, and when I say "language" I mean the resolution. There it is right there.

Mr. Coghlan: Yes, so I observe.

Mr. Harris: Just a minute, I will carry that up there. I am conducting this cross examination.

Mr. Coghlan: All right, if you insist on carrying this tremendous burden up there, I will let you do it—after I read it, however. Let Miss Whitney see that.

Mr. Harris:

Q. Is that the resolution that we were referring to that you, as a member of that certain committee at the Communist Labor Party, — on November —, please?

A. Yes.

Mr. Harris: May I read it just to refresh your recollection?

"Resolutions Committee recommends that the C. L. P. use all its strength and energy in the organization and education of the workers to utilize to the full extent their collective power to force the

unconditional release of each and devery one now serving a sentence as a political or class war prisoner.

H. L. Griest, Chairman. W. H. Eichhorn, Edw. R. Alver-
son, Charlotte Anita Whitney, D. D. Wemich, K. Bauer,
J. G. Wieler."

The Witness: May I call the attention of the jury to the fact that that resolution does not say that we will use force to free these prisoners, but that we will use all our strength and energy to do so.

Mr. Harris:

Q. The question was, whether or not you considered Herbert Stredwick, the I. W. W. in Fort Leavenworth penitentiary at Kansas, a class war or a political prisoner?

Mr. Coghlan: I don't think that is proper cross examination or material.

The Court: How does it become connected with this?

Mr. Harris: It becomes connected through this resolution in which she recommends. Pardon me, Mr. Coghlan, until I get through, I have always tried to listen to you until you finished.

Mr. Coghlan: I beg your pardon.

[fol. 411] Mr. Harris: This witness was asked as to her intentions in passing certain resolutions. Now, then, we have the resolution, and have read it verbatim, and we are asking her if she considered him one of the class war prisoners in the intention in the passing of the resolution.

The Court: Would it be necessary to ask her whether he was one of the class war prisoners?

Mr. Harris: Yes, whether he was one of the class war prisoners and one of the political prisoners, that they were using all their energy and strength, as she stated.

The Court: Is it not necessary first to show that, then ask for his classification?

Mr. Harris: We are getting at her intention as to whether or not she considers him a class war or political prisoner.

The Court: Go ahead.

Mr. Coghlan: That is not competent, relevant nor material, what she thinks about Stredwick, or what I think about him. That is not what counsel is attempting to get at, as a matter of fact. It is not cross examination, and it is not competent, relevant or material. What has that got to do with that offense. Here is the resolution in, and quite properly. Any other action taken by that convention is proven. She has been examined about that convention and about the things they have charged her with in this information but not about what she thinks about whether somebody is a class war prisoner or not. They would not allow us to ask that question, independently of some other witness. They say it was asking for the conclusion of the lady if we asked anything of that kind. That is the objection that would be made. It is not cross examination, and does not throw any light upon that situation at all.

The Court: I don't get yet what the cross examination is for. I don't quite understand your question, as to the cross examination.

Mr. Harris: You don't understand this cross examination? They asked her about her intention at this convention.

The Court: What was the language of the question? Let's have the question.

[fol. 412] (The Reporter reads back record on direct examination.)

Mr. Coghlan: Terrorism, crime. That's what it was.

The Court. Let's find out.

(The Reporter reads back testimony on direct examination further.)

The Court: The knowledge was called for on the objection of the People.

Mr. Harris: If your Honor please, we can readily see that she has said what the intention of this party was, or what it was not. She has gone into her part on the Resolutions Committee. Are we not entitled to cross examine on anything within the province of that?

The Court: You have a right to cross examine her on anything that she has stated as to the purpose of the principles and the—

Mr. Harris (interrupting): But not as to her activity?

The Court: Oh, yes, oh, yes, certainly you can.

Mr. Harris: Not as to any motive, if any there be?

The Court: Yes.

Mr. Harris: Now, then that is what that question is.

The Court: Now? Let's see, now.

Mr. Harris: The question is as to whether or not she is acquainted with Stredwick, who is in the penitentiary, and she said "Yes." Now, I am asking whether or not she considers him a class war or political prisoner.

Mr. Coghlan: Why, that is not cross examination, and I said that it is not competent, relevant or material under his own objection it is not.

Mr. Calkins: She must have had something in mind when she signed this resolution—what was it?

The Court: It does not strike me as being cross examination. If you can show me, I will be glad to listen to further argument.

Mr. Harris: Mr. Calkins just said that if he could have five minutes, he could show your Honor that point.

The Court: I will surely be glad to have all the law on this subject. It is within five minutes of the time for recess, and I will give you ten minutes, until 5 minutes after 11 o'clock. Ladies and gentlemen of the jury, you are admonished at this time not to converse [fol. 413] among yourselves or with any other persons upon any subject connected with the trial of this case, or to form or express an opinion thereon until the case is finally submitted to you. Let the officers be sworn.

(Officers sworn to take charge of the jury, and a recess was here taken.)

The Court (after recess): Will counsel stipulate that the jury are all present?

Mr. Harris: Yes, your Honor.

Mr. Coghlan: Yes, your Honor.

Mr. Harris: With regard to the question, if your Honor please, that we are just asking concerning, I will call your attention, respectfully, and counsel's likewise, to the case of People against Gallagher, 100 California at Page 475, reading from that:

"A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself, but if he offers himself as a witness he may be cross examined by the counsel for the People as to all matters about which he was examined in chief."

(Hereupon counsel reads decision in full.)

The Court: Is it offered to show a course of conduct inconsistent with statements made? Then according to that case it would be proper—pardon me, I am not shutting you out, I am just making a statement or comment, rather, on that case.

Mr. Coghlan: As essentially unimportant as this controversy is, I think that it deserves a reply. For instance, People against Morton, 139 California, page 719, settles that matter.

(Hereupon counsel reads and quotes from People against Morton.)

And the case of Biddleman, 104 California, page 108, is the case that touches conduct. The court might glance through that. That is an embezzlement case.

(Discussion.)

Mr. Harris: For your mere convenience, if your Honor please, we have had the direct testimony written up, so we would be pleased to hand it to you at any time your Honor finishes reading the law, to consider this point.

[fol. 414] (Discussion.)

The Court: Now, may I have that testimony?

Mr. Harris: The matter is submitted, if the Court please.

The Court: The last case that I had there seemed to follow this case that I have in my hand here, the 104 California, as to the conduct. You will notice there—

Mr. Harris: I presume your Honor means the Biddleman case in 104 California, which says that it was entirely competent for the prosecution to show by cross examination that his conduct was inconsistent with statements made in the direct testimony. That is—case Mr. Coghlan showed your Honor.

The Court: I know, I found a portion of it, although the syllabus

might be a little different. Right on the discussion of the point let's see what the question was; let us hear it.

Mr. Coghlan: Counsel is arguing to adduce this evidence to show conduct.

The Court: A course of conduct, actions and words——

Mr. Coghlan: That case upon which they base their contention the Biddleman case, is an embezzlement case.

The Court: They also show from the transcript, which appears to be helpful—did you show Mr. Coghlan, Mr. Harris, did you show Mr. Coghlan the transcript there?

Mr. Harris: Here is the transcript, Mr. Coghlan.

Mr. Coghlan: I don't want to extensively argue this matter. I have absolute faith in the position that I take. The Biddleman case supports me rather than them. They set up the conduct of the defendant, and that there is an embezzlement case. For instance, there — of course any conduct which impeaches his testimony as to the fact that he did not commit an embezzlement is the contribution to the sum of the facts about which the jury might infer his guilt or innocence. But never a word has been said about the matter that has been broached by this question in this whole record.

Mr. Harris: Well, anything that throws light upon her motives, rather than this resolution, I deem competent.

Mr. Coghlan: Is your Honor doubtful about this matter?

[fol. 415] The Court: No, I was about to rule upon it. I would like to hear the question read, however.

Mr. Coghlan: We are not very anxious, so if your Honor wants to admit this testimony, we will withdraw the objection. Let the question be answered.

Mr. Harris: Very well.

The Court: Very well. Will you read the question, Mr. Reporter?

Mr. Coghlan: Sometimes when we hope to save time, we only lose time.

(The Reporter reads question.)

A. You desire an answer to that question?

Mr. Harris: I would not have asked it, Miss Whitney, unless I did.

A. I would say that at the time the resolution was drawn up, as far as I know, no individuals were in the minds of any of the Committee, and certainly no names were mentioned on the adoption of this resolution.

Mr. Harris: Just a second. If the Court please, I am quite sure that Miss Whitney did not understand my question, or she would have answered it by "Yes" or "No." And it can be answered "Yes" or "No," and then an explanation made. But it is clearly evident that she is going on with something else, and it is possible she misunderstood. So would the Reporter read it again?

The Court: Do you want the question read?

Mr. Harris: Yes, your Honor, and let us have the answer as far as she has given it.

(The Reporter reads the question and answer.)

Mr. Harris: We would like to have the answer, as far as she has given it, stricken out as not responsive to the question.

Mr. Coghlan: You can explain afterwards, of course; you can explain afterwards. The statute allows you that right.

The Court: Mr. McSorley, read the question slowly to the witness.
[fol. 416] (The Reporter re-reads question.)

The Court: Now, give it due thought and consideration, and then answer, Miss Whitney.

Mr. Coghlan: At the time of this, the framing of this resolution?

Mr. Harris: Yes, did you consider him such at that time?

A. I did not have the man in mind at all at the time of the framing of the resolution.

Q. The question was not whether or not you had him in mind. But did you consider him a class war prisoner at that time?

Mr. Coghlan: I think the question has been answered. I don't think anything could be inferred, but that she did not consider the matter at all, from what she answered.

The Court: That is her answer, that she did not consider the matter at all. Let the answer stand.

Mr. Harris: Very well.

Q. Are you acquainted with Frederick Esmond, and I. W. W., who is in the Fort Leavenworth Penitentiary at Kansas?

Mr. Coghlan: Just a minute. Have you completed your question? I object to that as not proper cross examination, and not relevant, competent, or material.

Mr. Harris: It is preliminary, only.

The Court: Let it go as a preliminary question, for the same purpose, then.

A. I have met the man, yes.

Mr. Harris:

Q. You have met him?

A. Yes.

Q. You are quite well acquainted with him, are you not?

A. No, sir.

Q. Have you not corresponded with him?

A. I have had a letter from him since he was in San Quentin.

Q. Have you not written him a letter?

A. I answered his letter, yes.

Q. What?

A. I answered his letter.

Mr. Coghlan: She said yes.

Mr. Harris:

[fol. 417] Q. You are quite well acquainted with Stredwick, to are you not?

A. Yes, perhaps so.

Q. And a corresponding acquaintance at least, is it not?

A. Well, I have received letters from many people, and answered them.

Mr. Coghlan: This is evidently not preliminary at all, and I move it be stricken out, if your Honor please. Just a minute. We will see how far it is going to go.

Mr. Harris: That is as far as it is going on that.

Mr. Coghlan: Then I move that the answer to the question be stricken from the record, as it has no place in here.

The Court: I will not at this time strike it from the record. Let it stand, on this line.

Mr. Harris:

Q. Did you consider Frederick Esmond a class war prisoner at the time that you drew up this resolution?

A. I did not consider the man at all at the time that I drew up the resolution.

Q. Do you know Mortimer Downing, an I. W. W., who is in the penitentiary—do you not?

A. I have seen him.

Q. Did you consider him a class war prisoner at that time?

A. I did not consider him at all at the time the resolution was drawn up.

Q. At the time that you drew up this resolution, did you consider any I. W. W.'s as class war prisoners?

A. I can't say that I took that matter into consideration whatsoever.

Q. You had sent \$5 to the I. W. W. Defense Fund for the defense of the I. W. W.'s who were class war prisoners; that is, sent it to Bill Haywood, had you not?

Mr. Coghlan: I again object to that as not competent, relevant or material, and not proper cross examination.

Mr. Harris: It is barely possible—but I so thoroughly understood Mr. Coghlan to say that there was nothing that this woman had ever done, or nothing that this witness had ever done or had ever taken part in, that they were questioning or denying, and it was all admitted. I may have possibly gone too far in my conception of that statement—of course, if he desires to retract that statement, all right.

[fol. 418] Mr. Coghlan: I do not make any retractions at all.

Mr. Harris: Do you still stand upon your objection, then, Mr. Coghlan?

Mr. Coghlan: Well, I hope we are attempting to try this case according to law.

Mr. Harris: You are insisting upon your objection, are you?

Mr. Coghlan: Certainly, but you get it before the jury; that was your only intention, or you would not have asked the question.

Mr. Harris:

Q. When you drew up this resolution concerning class war prisoners, may I ask whom you considered to be class war prisoners, in drawing up that resolution?

Mr. Coghlan: Of course, that has been asked and answered, that she did not contemplate any particular person. But if they want her to answer it again, go ahead.

Mr. Harris: I do.

The Court: All right.

Mr. Harris:

Q. You meant men who had a violation of the law as class war prisoners?

A. I should not consider class war prisoners necessarily men that had broken any law; I should say a class war prisoner was a person who was in jail in an attempt to better the working conditions of men and the families of working men.

Q. And charged with a violation of what law, please? Men who were charged with a violation of what law, to be in jail?

A. I do not think that I could mention any specific law.

Q. You mean the Espionage Act, for instance, or refusal to go to war?

A. No; I said that I considered class war prisoners men or women who were in jail for an attempt to better the conditions of the working men and their families and children.

Q. For instance, Ford and Suhr, who were in jail to better conditions, as you call it, who murdered a man in Yolo County—is that what you mean by it?

Mr. Coghlan: Is that a fair question, Mr. Harris?

Mr. Harris: Yes. I am trying to find out for a violation of what law she means. We know very well that people are not in jail for [fol. 419] bettering conditions.

Mr. Coghlan: I don't know about that.

Mr. Harris:

Q. You mean, for instance, Ford and Suhr who are in the penitentiary at Folsom?

Mr. Coghlan: I think that is what you put her in jail for, or attempted to.

The Witness: I did not know and I do not know that Ford and Suhr are in jail for committing murder, since they only got a life sentence.

Mr. Harris:

Q. What did you understand them to be in jail for, if you consider them as being in that category of which you have spoken—bettering conditions?

Mr. Coghlan: I don't assume that she has so considered them. Do you?

Mr. Harris: Very well; withdraw it.

Q. Did you consider Ford and Suhr as being in that class?

A. I did not have in mind, in drawing up that resolution, the names of any special individuals.

Q. Do you now consider Ford and Suhr as being in that class which are in jail for bettering laboring conditions, as you term them?

Mr. Coghlan: I again urge my objection that that is not cross examination, or relevant, competent, or material.

The Court: That is going pretty far afield. Sustained.

Mr. Coghlan: Counsel has been allowed to go far enough, I think.

Mr. Harris: Very well, your Honor.

Q. For what crimes were these people in jail, whom you term class war prisoners?

Mr. Coghlan: That assumes something that is not in evidence. She said she had in mind no particular persons, and has defined what she means by a class war prisoner.

The Court: That has been answered.

Mr. Harris:

Q. What do you mean by a class war prisoner, then?

A. I think I have answered that question.

[fol. 420] Mr. Coghlan: That question has been answered, your Honor, definitely.

Mr. Harris:

Q. Then did you know of any men who were in jail as class war prisoners, as you define a class war prisoner?

Mr. Coghlan: We object to that as having been asked and answered. That is not proper.

The Court: This question is as to whether she knew of any.

Mr. Harris: Absolutely, sir.

The Witness: Would you mind reading the question?

(The Reporter reads the question.)

A. At the time this resolution was drawn up?

Mr. Harris:

Q. Yes.

A. I had no individuals in mind at the time.

Mr. Harris:

Q. Well, then, you don't mean to say that you didn't think there were men in jail as class war prisoners?

A. Yes, I think so.

Q. For what crimes were those people in jail, is what I am trying to drive at; what crimes, what were they charged with, do you know?

A. It would be a very difficult matter for me to say what people were charged with, what crimes, unless I had in mind the special individual.

Q. But you had class war prisoners in mind, did you not?

A. In general, yes.

Q. Did you have—can you tell us who they were that you had in mind, if anyone?

Mr. Coghlan: I think that has been answered. She said in general.

The Court: No one in particular, she said.

Mr. Harris:

Q. Do you describe it as that which has been termed "persecution being carried out under the cover of the criminal syndicalism law"? Is that your idea of it?

Mr. Coghlan: Now, you are asking for the opinion of this lady, about the question, and we object to it, as it is not proper cross examination.

[fol. 421] The Court: I don't think it is, under the objection. It is not a proper question.

Mr. Harris:

Q. Then I understand you to say that the best definition that you can give us of what you consider class war prisoners, and the crimes they have committed, was the betterment of the working class. Is that the best calculation that you can give us, Miss Whitney?

Mr. Coghlan: That would be the definition she has given.

Mr. Harris: I shall conduct the examination, and if I need you I shall call on you. I thank you for your service.

Mr. Coghlan: I object to the question on the ground that it is not a fair question.

Mr. Harris: Yes, I do. I think it is a very poor answer.

Mr. Coghlan: It does not contain the answer of the witness at all. It assumes something that is not in evidence.

The Court: The answer of the witness may be read, then, and then you may ask the question.

(The Reporter reads answer.)

The Court: It was not a repetition fully or with the substance of the answer in the question, when she gave her definition.

Mr. Harris: She states that she had class war prisoners in mind,

and we have a right to know to whom she is referring and what she means by class war prisoners, in this examination.

Mr. Coghlan: Those questions have been asked and answered.

Mr. Harris: And what these people were charged with, and by class war prisoners, if she considers Ford and Suhr, and people who are charged with murder as being class war prisoners, let us have it. I am going to stay with it until I get an answer, as to class war prisoners.

The Court: If you then ask her as to her definition as to class war prisoners, and ask for a better definition—wouldn't it be better to read to her the definition that she was already given last, than trying to give the substance of it here?

Mr. Harris: I think your Honor's suggestion is absolutely correct. [fol. 422] Mr. Coghlan: But you did not think my objection on the same line was correct.

(Discussion).

(The Reporter reads the following answer: "A. No, I said that I considered class war prisoners men or women who were in jail for an attempt to better the conditions of the working men and their families and children.")

Mr. Harris:

Q. I will again ask what you define as class war prisoners?

A. May I ask the Reporter to read the definition that I have already given again?

(The Reporter re-reads the answer, as above quoted.)

Mr. Harris:

Q. Can't you name one person who was in jail for bettering conditions, either man or woman?

Mr. Coghlan: That is not proper cross examination. It simply asks her for something that was not entered into at all, in her examination.

Mr. Harris: It relates to the resolution and her condition of her mind. We have a right to elicit the workings of her mind when she gives answers that are vague; we have a right to know what she means by those vague answers. Will you repeat the question, Mr. Reporter?

(The Reporter reads the question).

Mr. Harris:

Q. Who were in jail at that time, or are now,

Mr. Coghlan: At the time the resolution was made?

Mr. Harris: Yes, who were in jail at the time the resolution was made.

The Court: Yes, I take it that is the time you refer to.

Mr. Harris:

Q. What is your answer? If you answered, I did not understand it.

A. Yes. I think I would say that Eugene Debs was in jail for just that purpose.

Q. What was Eugene Debs charged with, if you know? I will ask you is it not a fact that he was charged with a violation of the Espionage Act?

A. I believe so.

Q. Sedition, was it not?

A. I don't remember now.

[fol. 423] Q. Anyone else? Anyone else?

A. I think Kate Richards O'Hair was.

Q. Eugene Debs was convicted in the United States Court by a jury and sent to the penitentiary, was he not?

A. Yes.

Mr. Pemberton: Objected to as not the best evidence.

Mr. Coghlan: Everybody knows it. So let it stand.

The Court: It may be sustained.

Mr. Harris: It is clearly evidence that we will not finish this by noon. So let us adjourn.

The Court: Ladies and gentlemen of the jury, you are admonished at this time not to converse among yourselves or with any other person upon any subject connected with the trial of this case, or to form or express an opinion thereon until the case is finally submitted to you. Let the officers be sworn.

(Officers sworn to take charge of jury, and a recess taken until two o'clock p. m.)

Afternoon Session

The Court: I am expecting the District Attorney to come in any moment.

People against Whitney. Will counsel stipulate that all the jurors are present?

Mr. Coghlan: Yes, your Honor.

Mr. Harris: So will we.

The Court: Very well. You may proceed.

Mr. Harris: Will you read the last question, Mr. Reporter, please?

(The Reporter reads the last question as follows: "Eugene Debs was convicted in the United States Court by a jury and sent to the penitentiary, was he not? A. Yes.")

Mr. Pemberton: Let the answer "Yes" be stricken out, then, I assume, your Honor?

The Court: Yes.

Mr. Coghlan: Well, we all know by reading the press. I don't [fol. 424] care whether it is stricken out, or not.

Mr. Harris:

Q. Kate Richards O'Hair was arrested and convicted by a jury in the United States Court for obstructing the draft of men into the United States Army, to fight with Germany, was she not?

Mr. Pemberton: To which we object on the ground that it is incompetent, irrelevant and immaterial; hearsay, and not the best evidence, and not cross examination, and has nothing on earth to do with this case at all.

The Court: It may be sustained. That is the same objection, isn't it?

Mr. Harris: Do you know what Kate Richards O'Hair was convicted of?

Mr. Coghlan: We object to that on the same ground.

Mr. Harris: If she knows of her own knowledge, if the Court please.

Mr. Pemberton: She could not know of her own knowledge unless she was there and examined the record.

The Court: Well, she could state, if she knows of her own knowledge.

Mr. Coghlan: Well, what relevancy would it have if she does now? Are counsel to be allowed to go into this kind of matter and libitum? It is not cross examination, and not proper at all.

The Court: I think that you will find the record is the best evidence on that. It is the best evidence, I think, of that conviction, and your objection would be good, then, under the circumstances.

Mr. Harris:

Q. What did you understand Kate Richards O'Hair to be convicted of?

Mr. Coghlan: We object to that question also; if counsel is very liberal, he will allow me to make the objection—I will object to it on the ground that it is not cross examination, it is not relevant, competent, or material and has nothing to do with this case, and nothing to do with her direct examination, which is limited to a convention, limited as they have limited us in their information. We could not go outside of that information when we first came [fol. 425] into court, nor could we get a bill of particulars at all.

Mr. Harris: She includes Kate Richards O'Hair as one of her class war prisoners, as it were, convicted of aiding the working man or something of that kind, as she put it, and for that reason I think I am entitled to it.

The Court: Well, the knowledge and all of that, of a conviction, would have a bearing, wouldn't it?

Mr. Harris: We want to know what caused her to link in that class.

Mr. Pemberton: Well, what business is it of yours? You must try her for what she does.

The Court: It may be sustained.

Mr. Harris:

Q. What other people?

Mr. Pemberton: Just a minute. Just a minute, now.

(Discussion.)

Mr. Pemberton: Keep your associate quiet and I will keep quiet.

Mr. Harris: I will try to.

(Discussion.)

Mr. Harris:

Q. What other person, Miss Whitney, what other persons other than Debs and Kate Richards O'Hair do you include in that?

Mr. Coghlan: Your Honor, isn't this the limit of cross examination? She testified—let's understand this—she testified as to what her definition was of a class war prisoner at the time that she drew this resolution, and it was presented; she had nobody in mind. Now, they have got all of that that they want; your Honor has stricken out some of it. But we all know that Debs was convicted and he was convicted in war time and all that kind of thing, everybody knows all about it. It is common knowledge. And why should counsel be allowed just to persecute and just to nag upon that proposition that has nothing whatever in the world to do with the cross examination of this witness, upon the foundation that we laid upon our direct examination, which was directed to [fol. 426] their charge. That is all in there.

(Discussion.)

Mr. Coghlan: That this matter might not be interminably drawn out, and that we might not spend another pleasant month under the cloudy skies of Oakland.

(Discussion.)

The Court: I do not understand just how this can be cross examination, that you are going into now.

Mr. Harris: Why, her answer here was—she said she had no particular person in mind—just a second. I would appreciate it if you would let me continue. And I asked her who she considered were class war prisoners, and now she begins to admit yes, she had Debs and Kate Richards O'Hair in mind.

The Court: Did she state that she had them in mind at the time of the resolution? I think not.

Mr. Harris: She states that she considers those class war prisoners. Now, then, we have a right to bring out who, if any one, she had in mind at the time she passed this resolution, or this resolution was passed, and we are going to follow it up, by showing that she had someone in mind previously to that time.

Mr. Pemberton: She has testified positively that at that time she had no one particular individual in mind, and what is in her mind at this time is not material in this case.

The Court: The purpose of the question is to ask this question and then undertake to show that those persons were in the mind of the witness at the time that she has answered that there was no one in mind.

Mr. Harris: She defines class war prisoners, doesn't she? We have a right to know who she means by naming the class war prisoners, who she classifies as being people who aided mankind or the working class, or something like that.

Mr. Coghlan: Let me interfere—then I will have done, and I won't talk any more for ten or twelve minutes. The proper foundation has not been laid for this, if the Court please. There is also [fol. 427] lutely nothing here to bridge over that hiatus in the absence of evidence which is created by the absence of any evidence that anything like a class war prisoner was to be liberated by means of force or by means of violence, or by means of doing anything unlawful, or by means of the advocacy of anything against the law. This lady has laid a foundation absolutely running counter to the assumption that class war prisoners meant anything in such a controversy as this, which ultimately is, Did she advocate criminal syndicalism? That is to say, the commission of crime or the commission of sabotage, for the purpose of bringing about an industrial change. Now, you see, your Honor, how far they are going away. She has testified as to what her opinion and what her views were at that time, at the time of this convention, as to what this convention meant. We tried to get her intention and could not get it because the counsel objected to it. And your Honor can see that this examination has nothing to do with the matter at all; this is an attempt, a present attempt, to do something that of course cannot be done here, or we would be much more violently objecting to it, to wit: a jury that cannot be prejudiced by this kind of stuff. But we hold that it is not cross examination, that it has no proper place here in an inquiry as to whether this woman is of that violent, vicious, criminal character that this denunciation of her in this information would indicate that she is. Now, if she did sympathize with Debs—and it is a matter that went to the jury, but your Honor struck it out, your Honor struck out the answer and would not allow it—everybody knows about that sort of thing, and everybody knows that both Republicans and Democrats were on either side, and I, for instance, might not have sympathized with Debs, but nevertheless everybody knows also that the newspapers were divided upon that proposition. But the point of inquiry here, it seems to me, ought to be, not what counsel has attempted to bring out, but what was done there at that convention, what did they intend to do there, and not what is meant by class war prisoners, and things of that kind, outside of her definition, because she said that at the time that resolution was drawn she did not contemplate and did not think of the [fol. 428] matter at all, excepting as defined, perhaps, by reports, for instance, of a United States Committee, the report of the Commi-

tee on Industrial Relations, which deals very extensively with what is known as that sort of a prisoner; and we know that there justice has not always prevailed, that the prosecution has not always been right, because once in a while juries do not find people guilty, that are accused of doing this or that, that the District Attorney says she is guilty of, or he is guilty of, so and so. This is not within the confines of cross examination, and we will let down the bars and withdraw our objection in order that there might be no mistake as to our attitude and as to our liberality in the matter of allowing cross examination as to what they have charged her with. But I don't think they ought to be allowed to go beyond that direct examination in this case, and carry it on interminably into to-morrow after to-morrow, until we have forgotten what we began with; and we have many times during the course of this trial, to wit, an information which charges her with violence, with a violent disposition, with a disposition of mind to break the laws of her country and her State and her municipality. That is the essential thing on all these charges, they all mean one thing, and if one leg of those five charges should fall, the whole thing must needs, logically, fall; they all mean one thing. And if she is convicted, will be convicted upon all five, and suffer the forty years, or seventy years, rather, of punishment that ought to be meted out to a person who is disloyal to that flag. I say, it is not proper cross examination, and I did not think so this morning, and even when I withdrew from the position that I had taken, I do not believe that this trial, this inquiry, ought to be allowed to go any further than it has gone. Your Honor has been exceedingly liberal to both sides in the matter of cross examination, but I think this is the very limit, the Ultima Thule of cross examination in a case of this kind. And in view of our direct examination, I say it should be confined.

(Discussion between Court and counsel.)

Mr. Harris: That is correct, is it? That is your contention?

[fol. 429] Mr. Coghlan: That is a fact, not a contention; it is a fact.

Mr. Harris: Well, let me read the questions to you that were asked on direct.

Mr. Coghlan: Go ahead.

Mr. Harris (reading):

"Was it to be, or did you intend that it should be an instrument of terrorism?"

"A. No, sir.

"Q. Or of violence?"

"A. No, sir.

"Q. Was it your intention, or the intention of the Convention, as far as you know yourself, to violate any law of this country or State?" Then we go on.

Mr. Coghlan: Let me see this record. I will show you what I mean. I might just as well justify myself. I would be very happy

if you had me on trial instead of Miss Whitney, because I think I am a guiltier man than she.

(Discussion.)

Mr. Harris: This is not argument, this is a speech. I ask that that portion of it be stricken out, if the Court please.

(Discussion.)

The Court: Never mind. Go ahead.

Mr. Coghlan: Mr. Calkins, it looks like, is merely trying to forecaste what your instructions are going to be, Judge. So I won't make any reply to that. Here it is: "Was it your intention"—here is one of the questions—"Was it your intention, or the intention of the Convention, as far as you know yourself, to violate any law of this country or State?" And Mr. Harris steps in and says: "Just a second, if the Court please, to which we object upon the ground that it calls for a conclusion as to what her intention was," and it of course follows, by reason of the case of the People against Ferrall, followed by the case of the People against Taylor, and every other case that discusses the fundamental rights of a defendant since defendants were allowed to take the witness stand in the State of California; and the very learned decision of Judge Sanborn; and I am now going according to the law of which I profess to be, of course, [fol. 430] entirely ignorant in comparison with these gentlemen who are possessed of so much knowledge of it—in which decision it was decided by the Court along, I think, about the 31st California, if counsel will look, I think he will find that is the right volume—that defendants always have a right to state what their conclusion is, to correct an impression that may have been derived from a statement that they have made, to show what they meant by a hearsay utterance, if you please. Since they have been allowed, under our liberal system, and under that flag, which we have been accused of defiling in this case, since we have been allowed, in other words, to put defendants upon the witness stand to testify to the truth of their positions—what their mind contains, what their intentions were, what they did something for—and they have uttered the same wording over since 31st California, which is the People against Farrall and the People against Taylor, which follows, I think, in 39 California—ever since that time the question has been permitted that I did propound. I don't want to insist upon that, but counsel makes the objection "Just a second, if the Court please. To which we object upon the ground that it calls for a conclusion as to what her intention was." Then Mr. Coghlan says:

"Did you or did you not know whether or not it was the purpose of that meeting to violate any known law?"

The Court: Mr. Coghlan, if the Reporter has the question right, and I think he has, the Court was discussing it, and I thought your question called for the intention of the Convention rather than the intention of the witness herself.

Mr. Coghlan: Those two things, your Honor, are already before this jury in issue, the intention of that Convention and the intention of that woman. They are both before this jury. And outside of that, so far as these charges are concerned, there isn't anything upon which we can come into court uninformed as to what we are to do. So I say to your Honor that it is not proper cross examination—this particular question—and your Honor has been exceedingly liberal and exceedingly industrious in the matter [fol. 431] of ascertaining what the relative or respective rights, rather, of the two Parties in this case are, and I really think that counsel does not believe that we ought to indulge in any further speculation, and that is all that is, as to these matters to which she has already fully testified, and which are really not cross examination.

The Court: What have you to offer?

Mr. Harris: Why, your Honor, the question up above "Did you intend" the things that were admitted this morning.

The Court: How could this come in?

Mr. Harris: Why, it comes in under the same ground that all the rest of it did, that you admitted this morning, your Honor.

The Court: But there was an objection, if you recollect, to that this morning. Let's see what the question is.

(The Reporter reads the question.)

The Court: In that definition, do you refer to something previous? There is something that has gone before, evidently, that you had in mind when you said "referred to" in that. She has testified as to what she considered class war prisoners or class war prisoners and political prisoners, and after she has testified to that, she testified—

Mr. Harris: Why, she testified as to whom she considered class war prisoners, and she has named two of them.

(Discussion.)

The Court: Well, that is what I am trying to say to you. That question was not objected to, was it? That question was not objected to, and the witness was allowed to answer.

Mr. Harris: I am asking what your Honor's ruling on it is.

The Court: You want to settle the ruling? That is it, then? Well, I want to ascertain what part of the direct examination this is cross examination of, and what are the grounds that the prosecution stands on, when they claim that this is cross examination. Let us have it.

Mr. Harris: I have stated already that she, the witness, has, in her direct examination, stated that she did as a member of this resolution committee, make certain recommendations. And I am [fol. 432] asking her what she considered class war prisoners, and following that up, she named them, she said what she considered them, and I asked her who she considered in that category, and she named two, and I asked her which others.

The Court: Well, then, there is that answer on direct examina-

tion, or in the examination here, that she had nobody at all in mind.

Mr. Harris: Yes, your Honor.

(Discussion.)

Mr. Coghlan: If the Court please, let us not forget that resolution. If it is not correctly reported here—but I think it is, you have a most excellent reporter—I will read it:

“Resolutions Committee recommends that the C. L. P. use all its strength and energy in the organization and education of the workers to utilize to the full extent their collective power to force the unconditional release of each and every one now serving a sentence as a political or class war prisoner,” meaning the same thing.

The Court: Then you may answer the question.

A. I have never had a list of people whom I considered class war or political prisoners.

Mr. Harris: Not whether you made a list, or not. I asked you whom else you considered as class war prisoners, as you have defined it.

Mr. Pemberton: To which we object on the ground formerly urged and on the additional grounds—

The Court: You are tying it up with the resolution?

Mr. Pemberton: On the additional grounds that it assumes a fact not in evidence and contradicted by the evidence.

The Court: You must, of course, tie it up to the time of the resolution.

Mr. Harris: In other words, then, I will ask the same question that I asked before, and withdraw the last question which she avoided by saying “I never made a list of them.”

Mr. Coghlan: All right. Let her stated, not only with reference to this convention, but any other time, what she deems to be a class war prisoner. We will withdraw our objection, and let that go [fol. 433] in.

The Witness: You mean to give my definition of class war prisoners?

Mr. Harris:

Q. Just tell whom you think is, and why you think he is a class war prisoner?

Mr. Coghlan: You have already defined that.

The Witness: Do you wish me, for instance, to say why I consider Debs a class war prisoner?

Mr. Coghlan: Yes, you have already defined that.

Mr. Harris: Is this a direct examination or cross examination Mr. Coghlan? Pardon me, is this a direct examination or a cross examination? I thought I was conducting this examination.

Mr. Coghlan: We are letting down the bars.

Mr. Harris: I am conducting the examination, as I understand it, but I may be in error.

(Discussion.)

The Court: Never mind; you are conducting the examination, and Mr. Coghlan has withdrawn his objection and asked this witness to go into the matter in the light of the decision.

Mr. Harris: Well, if your Honor please, I contend that I am doing the cross examination here, and as I said this morning, if I need Mr. Coghlan's help, I shall move my chair alongside of him, or ask him to move his alongside of mine. But so long as I am conducting the examination, I will ask the privilege of conducting it without his interjecting questions here and there to the witness.

(Discussion.)

Mr. Coghlan: In other words, counsel wants to grill this witness in his own fashion. I am only making an offer to him, and he is afraid to accept it.

Mr. Harris: I am not afraid to accept anything. But I think counsel and the defendant have had a noon recess together.

Mr. Coghlan: Yes, we have had a noon recess together, and decided upon this procedure.

(Discussion.)

Mr. Harris: Well, I am doing the cross examination.

The Court: Go ahead. Proceed.

[fol. 434] Mr. Harris:

Q. The question was, Who else you considered as class war prisoners?

A. Did I consider—I have tried to make it plain that I had never formulated a list of class war prisoners. I drew up, helped to draw up a resolution which was presented to the Communist Labor Party of California, and it is then for them to define whom the Party considers as class war prisoners or political prisoners, and to name them when they consider the time is ripe.

Mr. Harris:

Q. Then for the fifth time, I will ask you whom you consider as class war prisoners, besides Debs and Kate Richards O'Hair?

A. I have given my answer.

Q. Then you will not name any others?

A. I am not prepared to name any others.

Q. Did you consider Albert C. Fox, the I. W. W. who was convicted at Sacramento, was a class war prisoner?

A. I did not have an Albert C. Fox in my mind at all at the time of the drawing of that resolution.

Q. Did you consider Basil Saforis as a class war prisoner, the I. W. W. who was convicted at Sacramento?

A. I did not have him in mind at the time that I was in attendance at that committee.

Q. Did you ever have him in your mind as a class war prisoner?

Mr. Coghlan: Objected to as immaterial and not cross examination.

The Court: The time of the resolution would be the time, Mr. Harris.

Mr. Harris: Very well, Your Honor is then confining us to that.

Mr. Coghlan: Well, I didn't want to confine you to that.

(Discussion.)

Mr. Harris:

Q. Did you consider John Torrey?

A. I never heard the man's name, until I heard it in this court room within the last two or three times.

Q. Or Jacob Torry?

A. I never heard of him.

Q. Didn't you go on Jacob Torrey's bond at one time?

A. Never, never.

Mr. Pemberton: Have the prosecution a right to a bond?

Mr. Coghlan: Aside from that, her answer is conclusive.

[fol. 435] Mr. Harris:

Q. Who else did you consider as a class war prisoner? Can you name anyone else?

Mr. Pemberton: Now, if the Court please, isn't the witness entitled to a little protection once in a while? Hasn't this gone far enough?

The Court: Yes. The witness has already stated that she was not prepared to state any others whom she considered as class war prisoners. She has already stated that, and it may be sustained.

Mr. Harris:

Q. Did you consider all people against whom prosecutions were carried on under the criminal syndicalism law, as class war prisoners?

A. Do I consider them?

Q. Yes.

The Court: Read the question to her, Mr. Reporter.

(The Reporter reads the question.)

A. Not necessarily.

Mr. Harris:

Q. What?

A. Not necessarily.

Q. I didn't understand you?

A. Not necessarily.

Q. Not necessarily?

A. No.

Q. Did you consider McHugo a class war prisoner?

Mr. Pemberton: Are we to try McHugo now? We object to this on the ground that it is immaterial and not cross examination at all.
The Court: You may answer.

A. It would seem to me necessary to know something about the evidence that was brought out against any one before I could answer such a question as that. I was not present at the trial of McHugo, and know nothing about the evidence that was brought out against him.

Q. Were you present at the Debs trial, or the trial of Kate Richards O'Hair?

A. No, sir.

Mr. Coghlan: Why, we were all present at those; the press was full of it, for that matter.

Mr. Pemberton: Only the press disagreed sadly.

Mr. Harris:

Q. Miss Whitney, this morning you said that the Communist Labor Party was formed and was a political party?

A. Yes.

Q. Is that not correct?

A. Yes.

[fol. 436] Q. Anyone over the age of 18 years, whether a citizen of the United States, or not, could be a member of the Communist Labor Party, could they not, if they took the oath that is required of the Communist Labor members?

Mr. Pemberton: The oath?

A. I know they can be if they are over 18 years of age. I am not sure about whether they are a citizen, or not. It may be, and I may have forgotten that point. I am not sure.

Mr. Harris: That is all.

Redirect examination.

Mr. Coghlan:

Q. Now you read the report of the Committee on Industrial Relations, when it came out, did you not?

A. I did. I also attended the meetings that were held in San Francisco of that committee.

Q. There was something said in that report about class war prisoners, wasn't there?

Mr. Harris: Just a second. To which we object on the ground that the proper foundation has not been laid. It is not proper re-direct examination.

Mr. Coghlan: I think it is.

The Court: It is a proposition of something being said. She has answered "Yes." Let the answer stand.

Mr. Coghlan:

Q. Have you got in your mind a present, living, subsisting example of what you deem to be a class war imprisonment and the infliction of that degree of just punishment, without allowing the relief under the law that you directed our attention to when you defined class war prisoners?

Mr. Harris: Just a second. May I hear that question read, please Mr. Reporter? It seems to be compound.

Mr. Coghlan: I will withdraw the question and reframe it. It is rather long.

Q. Have you in mind a present example of what you deem to be class war imprisonment, and also a present example of what you deem to be industrial action to release such person?

Mr. Harris: Just a second. To which we object as being compound, [fol. 437] in the first place, if the Court please—the question is certainly compound.

Mr. Coghlan: Well, strike out the latter portion of it. Read the first portion of it and see if it is compound.

(The reporter reads question.)

Mr. Coghlan: From "and also," let that be withdrawn. You have in mind, have you or have you not, a present subsisting example of what you deem to be class war imprisonment?

A. Yes.

Q. What is that example?

A. Well, I think I can name some of the cases of the people who have been arrested under the criminal syndicalist law.

Q. Under this same law that you have been arrested under?

A. Under the same law under which I have been arrested, yes.

Q. Under the same group that you belong to?

A. Yes.

Q. What is the name of one of them?

A. It is the case of J. C. Wieler.

Q. What? J. G. Wieler?

A. Yes.

Q. Why do you say that he came under your definition of class war imprisonment?

A. Because——

Mr. Harris: Will you read that question, Mr. Reporter?

(The Reporter reads the question.)

Mr. Harris: Just a second. J. G. Wieler will be on trial in this case within a short time, and it seems to me that that is calling for

the conclusion of the witness and not proper re-direct examination, and an expression of hers as to what she considers.

The Court: Would that be a conclusion? Has she not a right to define it by example, they having drawn it from her? Has she not a right to define what she means by that? Let's see if it is not.

Mr. Coghlan: If the Court please, I would have a right to open this case up by an opening statement. But I did not want to bias or prejudice anybody. But this is just one of a large number of arrests which were made in this case.

(Discussion.)

[fol. 438] Mr. Harris: There is nothing here in the line of an objection. This is all argumentative in the extreme, and it is not matter that should be called to the attention of this jury. And I believe he should confine himself to the evidence.

Mr. Coghlan: That is precisely what is meant by that kind of a prisoner, which he has reference to, a prisoner who is not allowed his liberty under his constitutional rights, and prisoner that is not allowed counsel, for instance, a prisoner, for instance, who is not allowed to interview his counsel or anything of that kind; and the industrial action that occurs therefrom, that ought to go to this jury.

Mr. Harris. Now, if your Honor please, in reply thereto, let us call your Honor's attention to the resolution upon that matter. This is utterly new; it was not mentioned in the resolution, because it said those serving terms, already serving time, not for men who were arrested afterwards; and in the second place, under the able examination of Mr. Coghlan, she seems to be able to think of some men of whom she could not think when I had her under examination just a few minutes ago.

Mr. Coghlan: Well, she told me all about those at noon, in the discussion I had.

(Discussion between Court and counsel.)

Mr. Coghlan: Your Honor ruled it out. We were not entitled to go further. I asked if she knew of anything subsequent to that convention that meant an example of this same thing, and she said yes, and I want to put it to this jury, if I can; if I cannot, let it be stricken out, then.

The Court: Let's have the question. What is the question?

(The Reporter reads the question.)

The Court: Wouldn't that be conclusion and giving the opinion of the witness? I think so.

Mr. Coghlan: No doubt about that; that is exactly what your Honor has allowed her to give, as to what she thought a class war prisoner was, and she is giving her opinion as to that, and given examples now for the prosecution. And the same thing ought to [fol. 439] be allowed for the defense to do. We want to show what she means, and we want to show it if we can by example. But if your

Honor rules against us, we are not going to press this thing; we want to get through. We will ask her the same question as to what she really means on her direct examination here, and I do think that we are entitled to know of any example that she can now point out in view of the question asked her at this session by counsel as to what she means by class war prisoner.

The Court: She can point out what example. But going into the reasons for all that is a different thing, isn't it?

Mr. Harris: May I suggest that if your Honor feels inclined to that proposition, that I presume we will be allowed to try Wieler right here before this jury, before we are through with this.

(Discussion between Court and counsel.)

Mr. Coghlan: Why, you had this man's bail put at \$20,000, and ten members of the Labor Unions of this city came down to your office and had it reduced to ten. You know that.

Mr. Harris: Another one of those speeches of Mr. Coghlan's. We will excuse him, because in the heat of passion, I presume, he cannot be blamed.

(Discussion.)

Mr. Harris: I appreciate that, if the Court please, and I will pardon him for that reason. But I cannot help but feel that the jury should be admonished and instructed to disregard anything that was said by counsel just then.

The Court: Let the jury disregard the last statement made by counsel.

Mr. Coghlan: I would like to have the jury disregard any statement with regard to the trial of that man here at this time. That was brought on, not by me—I would not have said it if counsel had not opened the door to it—but I would like to have it all go out, and let them proceed in an orderly way, as we should.

The Court: I think you are pretty far away from the rule that you have stated. Now, as to the example. I do not think that we should go into a discussion of why she considers this man or that an example [fol. 440] ple, and in that way go into another case entirely. Let the objection be sustained.

Mr. Coghlan:

Q. Do you remember the terms of that resolution, which has been read to you—and you read it this morning yourself?

A. Yes.

Q. You spoke there of the use of all the strength and energy in the organization and education of the workers to effect the purposes designed by that resolution, or rather, proposed by that resolution?

A. Yes.

Q. Now, was there on your part, or on the part of anybody, to your knowledge, either by what was communicated to you, or through the tenets of that organization, or from any other source, any intention that that resolution should be enforced by the invocation of

violence or the commission of crime by force, or by any other means than a regular and legal media, through which we have all a right to act, to secure the liberation of prisoners?

A. Absolutely not. The resolution was presented in an open convention where reporters were present, and there could have been, under those circumstances, no idea upon the part of anyone of us of taking any action which would violate either the laws of our country, our State or our city.

Mr. Coghlan: That is all.

Mr. Harris: That is all.

[fol. 441] DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT, DIVISION ONE

No. Crim. 907

[Title omitted]

CLERK'S CERTIFICATE

I, J. B. Martin, Clerk of the District Court of Appeal of the State of California in and for the First Appellate District, Division One, do hereby certify the foregoing to be the record upon writ of error in the above-entitled cause as stipulated to by counsel for the respective parties, which record consists of the following, to-wit:

1. Copy of Order of Supreme Court of the State of California denying appellant's petition for hearing after decision by the District Court of Appeal, and endorsements thereon.

2. Copy of Minute Order of District Court of Appeal, First Appellate District, Division One, affirming judgment of Superior Court of the State of California in and for the County of Alameda.

3. Copy of the Remittitur, omitting therefrom the copy of the opinion of the District Court of Appeal, which opinion appears elsewhere in this record.

4. Copy of Opinion of District Court of Appeal in and for the First Appellate District, Division One, with all endorsements thereon.

5. Copy of stipulation as to record to be sent to Supreme Court of the United States.

6. Original Petition for Writ of Error.

7. Original Assignment of Errors.

8. Original Order allowing Writ of Error and directing execution of bond.

[fol. 442] 9. Original Writ of Error.

10. Copy of Bond on Writ of Error.

11. Original Citation on Writ of Error.

12. Copy of Clerk's Transcript on Appeal from final judgment of the Superior Court of the State of California in and for the County of Alameda, to the District Court of Appeal of the State of California, First Appellate District, Division One.

13. Copy of portions of Reporter's Transcript on Appeal from the Superior Court of the State of California in and for the County of Alameda to the District Court of Appeal of the State of California, First Appellate District, Division One, as stipulated to by counsel for the respective parties;

All being full, true and correct as shown by the records and files of my office.

Witness my hand and the seal of this Court this 28th day of May, 1923.

J. B. Martin, Clerk, District Court of Appeal, State of California, in and for the First Appellate District, By Walter S. Chisholm, Deputy Clerk, District Court of Appeal, State of California, in and for the First Appellate District.
(Seal District Court of Appeal, State of California. First Appellate District.)

Endorsed on cover: File No. 29,685. California District Court of Appeal, First Appellate District, Division One. Term No. 375. Charlotte Anita Whitney, plaintiff in error, vs. The People of the State of California. Filed June 18th, 1923. File No. 29,685.

STIPULATION AND ADDITION TO RECORD—Filed Dec. 16, 1924

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE FIRST APPELLATE DISTRICT, DIVISION I

Criminal. No. 907

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and
Respondent,

vs.

CHARLOTTE A. WHITNEY, Defendant and Appellant

A stipulation to amend the remittitur in the above case having been filed with this Court by the parties hereto, and said Stipulation being approved by this Court,

It is now ordered that the said remittitur be amended by inserting therein the following statement:

"The question whether the California Criminal Syndicalism Act (Statutes 1919, Page 281) and its application in this case is repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States, providing that no state shall deprive any person of life, liberty, or property, without due process of law, and that all persons shall be accorded the equal protection of the laws, was considered and passed upon by this Court;"

And the Superior Court of the State of California in and for the County of Alameda is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

Dated December 9th, 1924, City and County of San Francisco, State of California.

John F. Tyler, P. J.

I, J. B. Martin, Clerk of the District Court of Appeal, State of California, in and for the First Appellate District, do hereby certify that the preceding and annexed is a true and correct copy of an order made and entered herein on the 9th day of December, 1924, upon stipulation to amend remittitur, in the case of The People of the State of California vs. Charlotte A. Whitney, Crim. No. 907 herein, as shown by the records of my office.

Witness my hand and the seal of the Court, this 9th day of December, A. D. 1924.

J. B. Martin, Clerk, by Walter S. Chisholm, Deputy. (Seal of the District Court of Appeal, State of California, First Appellate District.)

[Endorsed:] Criminal. No. 907. In the District Court of Appeal of the State of California in and for the First Appellate District, Division I. The People of the State of California, Plaintiff and Respondent, vs. Charlotte A. Whitney, Defendant and Appellant. Order. John Francis Neylan, Attorney-at-law, First National Bank Building, San Francisco, California. Filed Dec. 9, 1924. J. R. Martin, Clerk, by Walter S. Chisholm, Deputy Clerk.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE FIRST APPELLATE DISTRICT, DIVISION I

Criminal. No. 907

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and
Respondent,

vs.

CHARLOTTE A. WHITNEY, Defendant and Appellant

STIPULATION

It is hereby stipulated by and between the respective parties hereto, that the record in the above entitled cause may be amended so as to show that the questions whether the California Criminal Syndicalism Act (Statutes 1919, page 281) and its application in this case is repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States, providing that no state shall deprive any person of life, liberty, or property, without due process of law, and that all persons shall be accorded the equal protection of the laws, were raised and decided adversely to plaintiff-in-error in the District Court of Appeal and the Supreme Court of the State of California, and that the remittitur may be amended accordingly.

Dated November 29th, 1924, City and County of San Francisco, State of California.

John Francis Neylan, Attorney for Plaintiff-in-Error. U. S. Webb, Attorney General of California, Attorney for Defendant-in-Error, Attorney-General of the State of California. John H. Riordan, Deputy.

I, J. R. Martin, Clerk of the District Court of Appeal, State of California, in and for the First Appellate District, do hereby certify that the foregoing and annexed is a true and correct copy of a stipulation, filed herein December 9, 1924, and signed by John Francis Neylan, Attorney for Plaintiff in Error, and U. S. Webb, Attorney General of the State of California, by John H. Riordan, Deputy Attorney General; Attorneys for Defendant in Error, in the

case of The People of the State of California vs. Charlotte A. Whitney, Crim. No. 1907 herein, as shown by the records of my office.

Witness my hand and the seal of the Court, this 9th day of December, A. D. 1924.

J. R. Martin, Clerk, by Walter S. Chisholm, Deputy. (Seal of the District Court of Appeal, State of California, First Appellate District.)

[Endorsed:] Criminal. No. 1907. In the District Court of Appeal of the State of California in and for the First Appellate District, Division I. The People of the State of California, Plaintiff and Respondent, vs. Charlotte A. Whitney, Defendant and Appellant. Stipulation. John Francis Neylan, Attorney-at-law, First National Bank Building, San Francisco, California. Filed Dec. 9, 1924. J. R. Martin, Clerk, by Walter S. Chisholm, Deputy Clerk.



3

ADDITION TO RECORD.

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 375. 10

CHARLOTTE ANITA WHITNEY,
Plaintiff-in-Error,

vs.

THE PEOPLE OF THE STATE OF
CALIFORNIA.

IN ERROR TO THE DISTRICT COURT OF APPEAL, FIRST
APPELLATE DISTRICT, DIVISION ONE,
OF THE STATE OF CALIFORNIA.

**COPY OF PLAINTIFF IN ERROR'S PETITION
FOR A REHEARING BY THE SUPREME
COURT OF CALIFORNIA, PRINTED AS
PART OF THE RECORD BY ORDER OF
THE SUPREME COURT OF THE UNITED
STATES, FEBRUARY 1, 1926.**

Filed February 11, 1926.

(29,685)



Criminal

No.

IN THE SUPREME COURT

of the

State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

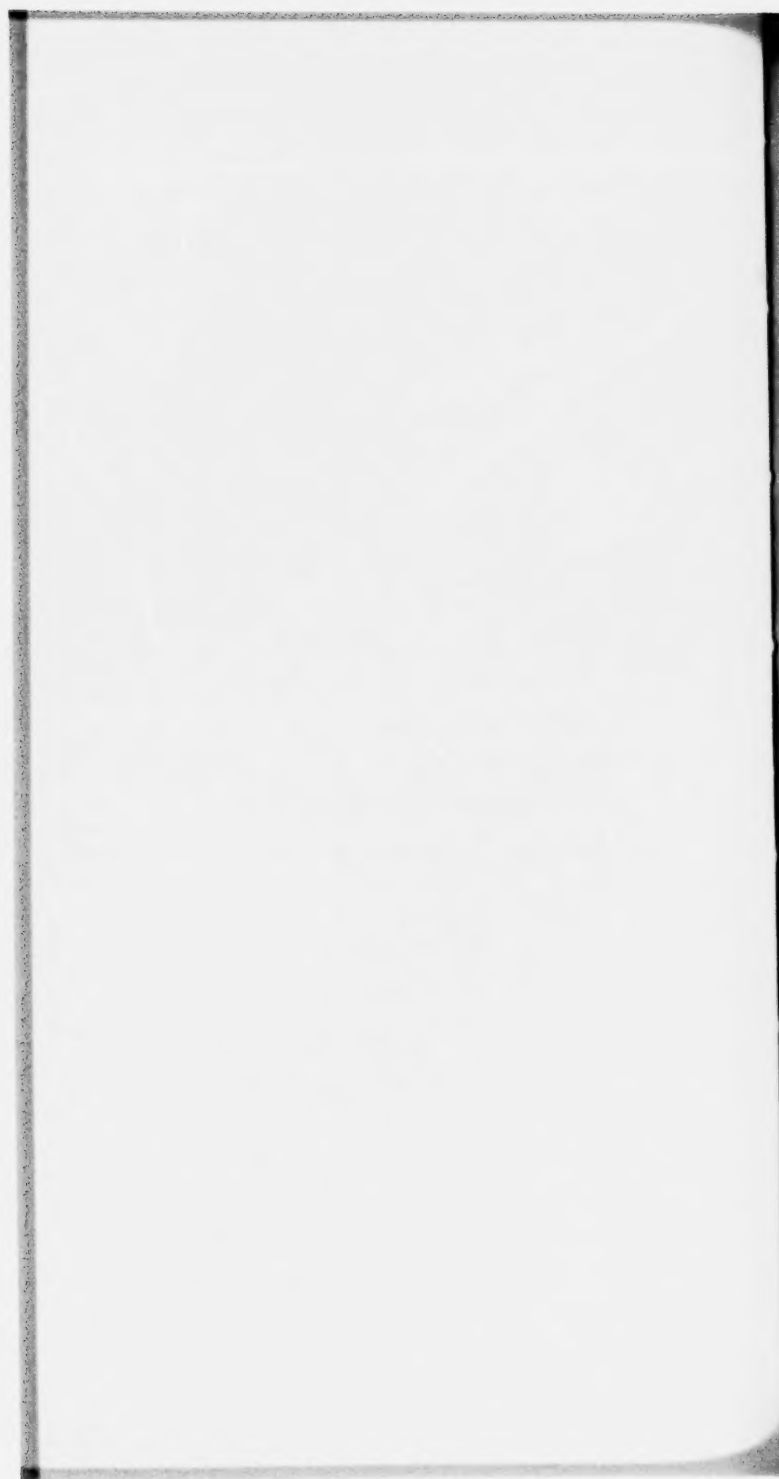
CHARLOTTE ANITA WHITNEY,
Defendant and Appellant.

**APPELLANT'S PETITION FOR A HEARING
BY THE SUPREME COURT,**

After Decision by the District Court of Appeal,
State of California, First Appellate District,
Division One, and Numbered Therein
Criminal No. 907.

JOHN FRANCIS NEYLAN,
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San Francisco.

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Foxcroft Building,
San Francisco,
Attorneys for Appellant
and Petitioner.



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Criminal

No.

IN THE SUPREME COURT

of the

State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

CHARLOTTE ANITA WHITNEY,
Defendant and Appellant.

**APPELLANT'S PETITION FOR A HEARING
BY THE SUPREME COURT,**

After Decision by the District Court of Appeal,
State of California, First Appellate District,
Division One, and Numbered Therein
Criminal No. 907.

*To the Honorable Lucien Shaw, Chief Justice,
and the Associate Justices of the Supreme
Court of the State of California:*

Your petitioner, Charlotte Anita Whitney, defendant and appellant herein, herewith makes

application for a hearing by this court of the above entitled cause after decision by the District Court of Appeal, First Division of the First Appellate District, affirming judgment of conviction in the Superior Court of the County of Alameda.

(1) The District Court of Appeal in the determination of the instant case, relies solely and alone on *People v. Taylor*, 62 California Decisions 546. In its opinion the court not only refers to *People v. Taylor* three different times in the course of a short opinion, but refers to no other case. The conclusion would be inevitable that the facts in the instant case and in the case of *People v. Taylor* were identical, or at least analogous.

Nothing could be further from the fact. It is respectfully submitted that not only are the facts in *People v. Taylor* and *People v. Whitney* totally dissimilar, but that the instant case presents a question of vital importance which has not been passed upon by this tribunal or even given consideration in the two cases in which this court has exhaustively considered the question of the criminal syndicalism law.

The instant case presents the following question: Does mere membership in a political party, without any showing of violence on the part of said party, without the commission of any act

of violence upon the part of the defendant, without any showing of the aiding or abetting of violence on the part of the defendant, without the showing of any knowledge on the part of the defendant of any violence or of any intention to commit violence, without the utterance on the part of the defendant of any violent sentiment, without any showing of approval on the part of the defendant of any act of violence already committed or contemplated, constitute a crime within the meaning of the criminal syndicalism law.

It will be remembered by this court that in *People v. Steelik*, 62 Cal. Dec. 536, the defendant was a member of the I. W. W., an organization made notorious by the fact that whether as an organization it advocated violence or not, its individual members perpetrated many outrages and crimes against property. In the case of *People v. Taylor* it will be remembered that the defendant while a member and an organizer of the Communist Labor Party was, at the same time, a member of the I. W. W., and that a large part of the evidence introduced at the trial tended to show, quoting from the decision of the District Court of Appeal that

“Taylor personally enunciated a program to bring about a general strike of the workers in all industrial and all governmental offices. The army and navy and police of the country

would be paralyzed by the strike and by the failure of telephone, telegraph, railroads and food supplies. The red guard of which he was to be the organizer, was to step in and immediately take control of all state, county and city offices which were to be ruled and governed by those who were in the 'inner circle,' or those who were to be recognized as leaders of the revolution. Taylor referred to the uprising as the 'bloody revolution'; he outlined that the red guard would seize the policemen, moving all the currency and coin to one central place, there to be held by the guard; all newspapers in the locality were to be seized, except one which as a matter of revolutionary tactics should be spared as a means of spreading the propaganda of the revolution. The members of the inner circle he outlined, had selected hiding places on the Mendocino Coast and in the Sacramento Valley to utilize in cases of emergency. In outlining his further plan Taylor, it is alleged, disclaimed any hope of success of political change through the help of the ballot and advocated sabotage as a weapon of the working class against the employers and capitalists, such as pulling up rails and derailing trains, and railroad strikes, destroying machinery and factories, destroying and wrecking street cars, and traction troubles. He also advocated, it is alleged, burning haystacks in order to bring the farmers to terms, and many more such violent activities."

While it is hard to believe that any sane person, or at least any person possessed of the judgment of a child of high-school age, could in the United States, under prevailing conditions, even seriously enunciate such a doctrine, yet the vital fact in distinguishing *People v. Taylor* from the instant case is the very fact that the defendant in *People v. Taylor* is at least charged with having been a member of the I. W. W., and personally advocating industrial and political change by the use of violence.

Charlotte Anita Whitney was not an I. W. W., there is no allegation that she was an I. W. W., nor the slightest bit of evidence suggesting that she ever personally had knowledge of the acts of the I. W. W., or approved any of their acts.

In the instant case Charlotte Anita Whitney, groping for a means to help the poor entered a public meeting in a convention hall in the City of Oakland, and there joined the Communist Labor Party; secondly, she acted as a member of the credentials committee of that convention; and thirdly, her name is signed to a resolution advocating amnesty for what were termed political and class war prisoners.

This is the sum of her offending.

An analysis of the 598 pages of testimony taken at her trial does not disclose one word even purporting to show:

That she ever committed an act of violence;
 That she ever aided or abetted violence;
 That she ever advised violence;
 That she ever uttered a violent sentiment;

That she ever knew of any act of violence offered by any organization or individual belonging to any organization;

Or even that the organization in which she admits membership ever committed any act of violence.

On the contrary, the record indicates that Charlotte Anita Whitney was opposed to all violence and held convictions against it as strongly as those held by people of the Quaker faith, whose religious scruples are respected and not made the basis for snare and prosecution.

It is not alleged nor suggested that Charlotte Anita Whitney was ever a member of the Industrial Workers of the World or of the Bolsheviks of Russia. There is not one scrap of evidence even remotely suggesting that she ever endorsed any act of violence either by these organizations or by individuals belonging to these organizations.

Yet appellant believes that no intelligent human being can review the record of her trial and not be forced to believe that a conviction was secured by inflaming the minds of the jurors with the idea that she was in some degree responsible for and sympathetic with the atrocious crimes committed either by these organizations or members thereof.

It is respectfully urged that never in the history of California was there a plainer miscarriage of justice.

Never in the history of California was a defendant before a court of justice so ruthlessly deprived of vital rights guaranteed under the Constitution.

Never was there a more apparent indecent haste to appease public wrath by the offering up of a vicarious sacrifice.

The time has now arrived in the free United States of America when, even if inadvertently, you should join a political party which expresses sympathy with a political change any place on earth, you are a criminal syndicalist and liable to serve a sentence of fourteen years in the penitentiary. It seems incredible that this should be true, but the facts in the Whitney case prove conclusively that this is the exact fact.

An analysis of the prosecution's case demonstrates conclusively that when it was found im-

possible to prove that in any degree Charlotte Anita Whitney had ever advocated violence or taught violence, when it was found that her entire life was a denial of violence and that her personality was the antithesis of violence, when it was found impossible to prove that the Communist Labor Party, of which she was a member, had been involved in any violence, resort was had to the introduction of testimony as to acts committed by criminals belonging to the Industrial Workers of the World and acts committed by the Bolshevik regime in Russia.

Not only was Charlotte Anita Whitney not a member of the I. W. W. organization or of the Bolshevik party of Russia, but there is not one shred of testimony even remotely suggesting that she ever sympathized in any degree with any of the excesses committed by any individual belonging to any of these organizations or by these organizations as such.

In attempting to justify the deluging of the jury in the trial of Charlotte Anita Whitney with testimony as to crimes committed and advocated by the Bolsheviks of Russia, thousands of miles distant, and of crimes committed by members of the I. W. W. organization two and three years prior to the trial of Charlotte Anita Whitney, it has

been argued that the court instructed the jury that defendant was not to be charged with responsibility for acts done outside of her presence.

The transcript of testimony shows that conservatively speaking, sixty per cent of the testimony taken had reference to the Bolsheviks of Russia or the acts of I. W. W.'s.

To assert that this testimony did not arouse in the jury an unjust prejudice against the defendant after the jury had witnessed the admission of this testimony as pertinent, competent and relevant, and after the jury had listened to this testimony hour after hour and day after day, is to deny the obvious.

If it were simply desired to show the character of the Bolshevik regime in Russia and of the I. W. W. organization, and if it were not the determination of the prosecution to inflame the mind of the jury unjustly against Charlotte Anita Whitney, what further testimony was necessary, admitting for the sake of argument that it was relevant and competent, than the manifestoes of the Bolshevik party and the printed propaganda of the I. W. W.'s.

The record shows conclusively that the prosecution was in possession of thousands of circulars

by the introduction of any one of which it could have proved the character of Bolshevism or I. W. W.ism. Yet for days we find witnesses paraded before the jury, testifying to crimes committed in remote places without the knowledge of Charlotte Anita Whitney and without any suggestion that she had any knowledge of the crimes or that the party of which she was a member had any knowledge of the crimes testified to.

It is apparent from the record that the weakness of the proof against this defendant was such as to require conclusions not warranted by the premises on which they are based.

It is a significant fact that throughout 998 pages of testimony there is not a single word to prove or to suggest that Charlotte Anita Whitney ever directly or indirectly had any knowledge of any revolutionary movement, and particularly is the record bare of any evidence to prove that Charlotte Anita Whitney had any knowledge whatsoever of any crime committed either by the Bolshevik party of Russia or the I. W. W. It seems apparent that with the activity and zeal displayed in the prosecution of this defendant, any violent sentiment ever uttered by her which could have

been supported by any kind of evidence would have been introduced at the trial to establish that she had *knowingly* become a member of a party committed to criminal syndicalism. Yet we find not one word to establish any knowledge of violence or approval of violence upon the part of this defendant.

The only acts of Charlotte Anita Whitney concerning which there is any testimony whatever are her acts as a member of a committee on resolutions. All of these resolutions were introduced at the trial and are to be found on pages 252, 253, 254 and 255 of the transcript of testimony. These resolutions read as follows:

“The C. L. P. of California fully recognizes the value of political action as a means of spreading communist propaganda; it insists that in proportion to the development of the economic strength of the working class, it, the working class, must also develop its political power. The C. L. P. of California proclaims and insists that the capture of political power, locally or nationally, by the revolutionary working class can be of tremendous assistance to the workers in their struggle of emancipation. Therefore, we again urge the workers who are possessed of the right of franchise to cast their votes for the party which represents their immediate and final interest—the C. L. P.—at all elections, being fully convinced of the utter futil-

ity of obtaining any real measure of justice or freedom under officials elected by parties owned and controlled by the capitalist class.

(Signed) By the Whole Committee.
H. L. Griest, Chairman,
W. H. Eichorn,
J. G. Wieler,
D. D. Wemich,
Charlotte Anita Whitney,
Edw. R. Alverson.

"CO-OPERATIVES & WORKERS CONTROL.

"We congratulate the Workers on the stand taken by them in the movement for workers control of industries as evidenced in the movement known as the Plumb Plan for control and management of the R. R. and also the effort of the workers generally to eliminate the exploiter by the establishment of co-operative societies.

"At the same time we feel compelled to point out to all workers that the Labor Problem cannot be solved by any such scheme for only part of the working class, that the Labor Problem must be settled by all the workers for all them, and that the only solution will be found to rest in the establishment of a communist labor society which is based upon the collective ownership of all means of production of the working class.

(Signed)

K. Bauer,
W. H. Eichhorn,
D. D. Wemich,
J. G. Wieler,
H. L. Griest,
Edw. R. Alverson,
Charlotte Anita Whitney."

“Resolved. That we denounce the bloody course of action of the government in carrying on an undeclared war against Soviet Russia, as being in conflict not only with the fundamental law of the land, which requires congressional sanction for warfare upon any people—but also with every rule of decency and honesty.

“We demand the withdrawal of all support by the government from capitalist interests who are forcing imperialistic wars in any country and recommend that the unwarranted attitude and actions of the government in its relation with Russia, Mexico, Hayti and San Domingo be made a special and vigorous part of the propaganda of the C. L. P.

K. Bauer

D. D. Wemich

H. L. Griest

Edw. R. Alverson

C. A. Whitney

J. G. Wieler

W. H. Eichhorn.”

“The Resolution Committee recommends that the C. L. P. of California extend, through its official channel, a sincere invitation to the Socialist Labor Party and the Communist Labor Party for the purpose of discussing, and, if possible, devising ways and means whereby unity of these organizations may be effected.

Signed by the Whole Committee

H. L. Griest, Chairman

W. H. Eichhorn

J. G. Wieler

D. D. Wemich

Charlotte Anita Whitney

Edw. B. Alverson.’

"The C. L. P. of the State of California declares itself to be uncompromisingly in favor of industrial unionism, and we recommend to each local that at all times the combined energies of the comrades be devoted in building up of industrial unions.

Signed by the Whole Committee

H. L. Griest, Chairman

W. H. Eichhorn

J. G. Wieler

D. D. Wemich

H. Bauer

Charlotte Anita Whitney

Edw. B. Alverson."

"Resolutions Committee recommends that the C. L. P. use all its strength and energy in the organization and education of new workers to utilize to the full extent their collective power to force the unconditional release of each and every one now serving a sentence as a political or class war prisoner.

H. L. Griest, Chairman

W. H. Eichhorn

Edw. B. Alverson

Charlotte Anita Whitney

D. D. Wemich

K. Bauer

J. G. Wieler."

It will be noted that the first of these resolutions expresses recognition of the value of political action and urges the workers who have the right to vote to cast their ballot for the Communist Labor Party; the second resolution endorses

what was known as the Plumb Plan for control and management of the railroads, a plan which was seriously discussed by the National Government in a time of emergency; the third resolution denounces the conduct of an undeclared war against Russia. It is a notable fact that some of the most conservative statesmen of America including the present President of the United States denounced the same enterprise, but perhaps in more intemperate language than used in this resolution; the fourth resolution discusses a conference with the Socialist Labor Party; the fifth resolution declares in favor of industrial unionism; the sixth and final resolution urges the workers to utilize to the full extent their collective power to force the release of what were termed political or class war prisoners.

It should be remembered that the trial of Charlotte Anita Whitney occurred in the month of January, 1920, almost a year and a half after the conclusion of the war, the convention of the Communist Labor Party took place in November, 1919, a year after the conclusion of the war. It is a notable fact that it was after the receipt of many petitions of this character that the President of the United States took up for consideration the question of the pardon of Eugene V. Debs, con-

victed of having obstructed the progress of the war, and finally granted to Debs a pardon.

Much additional data could be presented to the court in support of this petition for hearing on the vital question of whether mere membership in a party, without proof of approval of violent aims, and without clear proof of a knowledge of violent aims, constitutes a crime within the meaning of the criminal syndicalism law.

Constitutionality.

(2.) Conscious of the fact that in passing on an application for a writ of prohibition this court has rendered an opinion stating:

“We see no merit in the claim that the act under which petitioner is being prosecuted is invalid as being in violation of the *federal* and state constitution” (our italics);

and also conscious of the fact that the only opinion of a higher tribunal in California discussing the question at length by implication upheld the constitutionality of the act by reference to the case of *People v. Moilen*, 167 N. W. (Minn.) 345, 348, petitioner respectfully urges that a thorough review of all of the aspects of this question will sustain the contention of unconstitutionality as to a

portion of the California Act, and will demonstrate conclusively the vital distinction between the criminal syndicalism act of the State of Minnesota and the criminal syndicalism law enacted by the State of California.

Appellant respectfully urges that the criminal syndicalism law of the State of California, as it stands, is violative of the 14th Amendment of the Constitution of the United States.

The case of the State v. Moilen cannot be taken as conclusive in relation to the California statute because of a vital difference in the language employed in the two statutes.

The Minnesota statute prohibits the advocacy of crime, etc., "*as a means of accomplishing industrial or political ends.*"

The criminal syndicalism act of California punishes violence or unlawful methods of terrorism, etc.,

"as a means of accomplishing a change in industrial ownership or control or effecting any political change."

In other words, the Minnesota statute provides a penalty for the commission of any act of violence or the teaching or aiding or abetting of any act of violence designed to effect any political end. It would apply with equal vigor to the person who would employ methods of terrorism or of vio-

lence, for instance, to prevent a change in the prohibition law, and to the person who would use such methods to bring about a change in the prohibition law.

The Minnesota statute would punish the corrupt holder of a political office who would seek by methods of terrorism and violence to prevent his being ousted lawfully from office, and at the same time would punish the aspirant for political office who would resort to means of terrorism or violence to bring about the desired political end.

In other words, the Minnesota statute does not discriminate between classes of persons, but is general in its application and is in accord with the Constitution.

The Minnesota statute with equal force applies to those engaged in industrial controversies. It would punish the person who would seek by violence and terrorism to prevent a change in industrial control, as well as the person who by those methods sought to accomplish a change.

The criminal syndicalism law of California expressly refers only to those who seek by violence or methods of terrorism to accomplish a change in industrial ownership or control, or to effect a political change.

Under the California law the corrupt holder of political office might with impunity organize a group to maintain itself in office by violence or terrorism and escape any penalty under the criminal syndicalism law, while the persons desiring to oust such corrupt regime would be guilty of criminal syndicalism and liable to punishment.

The proponents of prohibition might organize to control by methods of terrorism elections to the legislature and not be guilty of criminal syndicalism, while the opponents of prohibition at the same election using the same methods would be.

The opponents of city and county consolidation in the City of Oakland and County of Alameda, could without regard to the criminal syndicalism law organize by violence to defeat the measure on this subject shortly to be submitted to the voters of that locality. The proponents of city and county consolidation however would be liable to fourteen years' imprisonment for the same offense.

The present owners of industries in California might practice violence to prevent the application of new laws providing for control of industries by the Railroad Commission of the State of California and not be guilty of criminal syndicalism.

Illustrations might be multiplied indefinitely to accentuate the discriminatory character of the law.

No doctrine has been more explicitly or frequently promulgated by the courts of the United States than the doctrine which holds that classifications in legislation to avoid violating the equality clause of the Constitution must be reasonable and not arbitrary.

It seems impossible to conceive a more arbitrary classification than that which permits one person or group to prevent a change while making it criminal for the opposing person or group to accomplish the change.

12 C. J., 1133:

"Statutes passed in the interest of the public health, safety or morals, are void as class legislation whenever they are made to apply arbitrarily only to certain persons or classes of persons, or to make an unreasonable discrimination between persons or classes."¹ *Citing cases.*

12 C. J., 1141:

"But on the other hand a penal statute which makes arbitrary distinctions between different persons or classes of persons, either by making certain acts criminal offenses when committed by some persons but not when committed by others * * * has been declared unconstitutional as class legislation."² *Citing cases.*

12 C. J., 1175:

"A statute or ordinance is void as a denial of the equal protection of the laws which makes a particular act a crime when committed by a person of one race but not when committed by a person of another race."

12 C. J., 1186:

"A legislation is void as contravening the equal protection guaranty which makes an act a crime when committed by one person but not so when committed by another in a like situation" (Citing cases), "or which makes the question as to whether a certain act is criminal or not depend on an arbitrary or unreasonable distinction between persons or classes of persons committing it" (citing cases), "within these rules statutes or ordinances have been sustained which have made it a criminal offense * * * to incite to the unlawful destruction of property" (Citing cases).

12 C. J., 1187:

"A statute is void as a denial of the equal protection of the laws which prescribes different punishments or different degrees of punishment for the same acts committed under the same circumstances by persons in a like situation" (Citing cases).

He Ah Fong, Fed. Cases 102 (3 Sawy. 144):

"The equal protection of the laws under the 14th Amendment implies not only equal accessibility to the courts for the prevention

or the redress of wrongs and the enforcement of rights, but equal exemption with others of the same class of all charges and burdens of every kind."

Ho Ah Kow v. Noonan, Fed. Cases 6546
(5 Sawy. 552):

"The equality of protection assured by the 14th Amendment implies that no charges or burdens shall be laid upon one person which are not equally borne by others, and that in the administration of federal justice one person shall suffer for his offenses no greater or different punishment than another."

In re Tiburcie Perrot (C. C.), 1 Federal
481; 1 Ky. L. R. 136:

"Discriminating legislation by a state against any class of persons or against persons of any particular race or nation in whatever form it may be expressed, deprives such class of persons, or persons of such particular race or nation, of the equal protection of the laws and is prohibited by the 14th Amendment to the Constitution of the United States."

State v. Williams, 32 S. C. 123; 10 S. E.
876;

"General Statutes 2084, which makes the violation of a contract between land owner and a laborer indictable and fixes the limit of punishment in the case of the landowner, but imposes no limitation in the case of the laborer, is unconstitutional, as making a discrimination in the punishment which may be imposed."

Peonage Cases, 123 Fed. 671:

"Act of Alabama, Mar. 1, 1901, makes it a penal offense for any person who has contracted in writing to labor for another for any given time * * * and who shall afterwards without the consent of the other party and without sufficient excuse, to be adjudged by the court to 'leave such other party * * * and take employment of a similar nature from other persons without giving him notice of the prior contract.'

"Another statute subjects the new employer to penalties if he employs such person with knowledge of the prior contract. Held, such statute is unconstitutional as class legislation, subjecting laborers to penalties for breach of contract which are not imposed on any other class of citizens. Statute also denies to class of citizens affected the equal protection of the laws."

Re Langford, 57 Fed. 570:

"The act involved required knowledge on the part of the person charged that intoxicating liquor was intended for sale; subdivision 2 made it a criminal offense for any servant of a special class of common carriers to remove from a car any intoxicating liquor whatever, without any qualification as to knowledge that it was intoxicating liquor and without attaching any liability to the person receiving the liquor from the carrier. Held, subdivision 2 discriminated in singling out one class from the whole community for punishment. The South Carolina constitution provided that 'No person shall be liable to any other punishment for any offense, or be

subjected in law to any other restraints of disqualifications in regard to any personal rights, than such as are laid on others under like circumstances.' ”

Horwich v. Walker Gordon Laboratory Co., 68 N. E. 938:

“Act prohibiting sale and use of cans, boxes, bottles, etc., bearing the registered mark of the owner without his consent is in contravention of the Constitution, Art. IV, par. 22, prohibiting special legislation, as it gives the owners of the property of the class named rights not enjoyed by owners of other classes of personal property.

“The act also provided that the possession of such articles by junk dealers was prima facie evidence of unlawful possession. Held, unconstitutional, as it authorized conviction of such dealers on evidence that would not warrant the conviction of other persons.”

The analogy here is that the joining of a society advocating crime to bring about a political change is a violation of the criminal syndicalism law, while the joining of a similar society for the purpose of preventing a political change is not a violation of the law.

Re Opinions of Justices, 207 Mass. 601;
94 N. E. 558; 34 L. R. A. (N. S.) 604:

“Rendering proprietor of a Chinese restaurant criminally liable for permitting women

under the age of twenty-one years to enter it or be served with food and drink there, deprives him of his liberty and property without due process of law and deprives him of the equal protection of the laws. Police power does not extend to exclusion of young women from restaurants kept by Chinese, since such a regulation has no direct relation to the evil to be remedied."

The above is from the syllabus. The following is the last paragraph of the opinion:

"The fact that a man is white or black or yellow is not a just and constitutional ground for making certain conduct a crime in him when it is treated as presumably an innocent act in a person of a different color."

American Sugar Refining Co. v. McFarland, 229 Fed. 284:

"Act of Louisiana, par. 10, of 1915, regulating the business of refining sugar, provides that any person engaged in the business of refining sugar within the state, who shall systematically pay in Louisiana a less price for sugar than he pays in any other state, shall be prima facie presumed to be a party to a monopoly or combination in restraint of trade or commerce, and upon conviction thereof subject to a fine of \$500 a day for the period during which he is adjudged to have done so, and that the business of refining sugar within the meaning of that act is thereby defined to be that of any concern that buys or refines raw or other sugar exclusively, or that refines

raw or other sugar taken on toll, or that buys or refines more raw or other sugar than the aggregate of the sugar produced by it from the cane grown and purchased by it. Held, that the discrimination between the sugar refiners to which it applies and buyers of sugar not engaged in refining or refiners of sugar not engaged in refining in Louisiana, or not buying or refining more sugar than that produced from cane grown and purchased by them, or not buying sugar in any other state, is such a denial of the equal protection of the laws to the refiner to which it applies as to render the statute invalid and unenforceable, as it makes the fact of one's ownership of property in Louisiana the test of criminality, *and makes an arbitrary selection of the parties who shall be subjected to its penal provisions*, without regard to any difference between their delinquency and that of others."

The following is taken from the opinion:

"Unless the legislature may arbitrarily select one corporation or one class of corporations, *one individual or one class of individuals*, and visit a penalty upon them which is not imposed upon others *guilty of a like delinquency*, this statute cannot be sustained. * * * Arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this." Citing *Gulf of Colorado and Santa Fe R. R. v. Ellis*, 165 U. S. 150, 159; 17 Supreme Ct. 255, 258; 41 L. E. 666.

Re Mallon, 16 Ida. 737; 22 L. R. A. (N. S.) 1123:

"Sec 6452 Revised Codes, in fixing the punishment of a person who escapes from a states prison at the same term for which he is serving at the time of the escape denies equal protection of the law to persons under like circumstances, and, in providing that the escape of a state prisoner is made a crime and exempting federal prisoners and others who may be confined in the penitentiary for temporary purposes, is special and discriminatory legislation and violates the 14th Amendment to the Constitution of the United States and the Constitution of Idaho."

Miller v. Sincere et al., 112 N. E. 664:

"While the legislature has a wide discretion in determining what shall be considered a crime and the classification of crimes, discriminations of criminal statutes applying to certain persons or classes must be based on valid, and not upon mere arbitrary classification in favor of certain individuals or corporations."

Commonwealth v. International Harvester Co. of America, 115 S. W. 755:

"A statute which, when construed according to the canons of statutory construction, *confers a right on one class of citizens to do an act made a criminal offense* when done by one other class, conflicts with the 14th Amendment of the Federal Constitution."

State v. Latham, 98 Atl. (Me.) 578:

"If legislative regulations differ as to localities, classes and conditions, the classifications must be reasonable, and based upon a real and not arbitrary difference in conditions."

"Revised Statutes, Chapt. 136, par. 12, requiring milk dealers to pay for purchases semi-monthly, and providing for punishment by fine on default in payment, is unconstitutional as violating Constitutional Amendment No. 14, as to class legislation, and is not justifiable under the police power as being for the protection of public health."

The above is from the syllabus.

The following is from the opinion:

"Diversity in legislation to meet diversities in conditions is permissible. But if legislative regulations for different localities, classes and conditions differ, in order to be valid, these differentiations or classifications must be reasonable and based upon real differences in the situation, conditions or tendencies of things. Arbitrary classification of such matters is forbidden by the Constitution. If there be no real difference between the localities or business or occupation or property, the state cannot make one in order to favor some person over others. Citing a large number of cases.

"This statute does not apply to all classes of debtors, but to one class. It does not apply to all debts incurred by purchase of products, but to one class of debts. * * * *It sub-*

jects a class of debtors to liability of criminal prosecution to which other classes of debtors are not subject."

Re Van Horn, 70 Atl. 986, from the opinion:

" 'Equal protection of the laws' must certainly mean equal security or burden, under the laws, to everyone similarly situated. A statute to escape condemnation as infringing the rights guaranteed by this amendment (14, United States Constitution) must bear alike upon all individuals and classes and districts that are similarly situated, in a similar manner, and with uniformity. Otherwise, there would be unjust discrimination, which this constitutional mandate prohibits. The purposes of the constitutional amendment must have been to prevent that which was arbitrary and capricious and to require uniformity and equality under like conditions. The so-called police power of the legislature which enables it to make regulations and restrictions to protect the health, morals, safety or welfare of the general public; and its determination will rarely, if ever, be interfered with by the courts. But this does not justify a legislative enactment which discriminates when there is no basis for discrimination. *Whenever an enactment has attempted to make that a crime in one place which by all the laws of reason must be a crime elsewhere within the same jurisdiction*, such attempted distinction is found by the courts to be illusory and the act is held unconstitutional."

State v. Divine, 98 N. E. 778.

Birmingham Water Works Co. v. State, 48
So. 658:

"The sum of these provisions is that no burden can be imposed on one class of persons, natural or artificial, which is not in like conditions imposed on all other classes." Citing cases.

Sterret Packing Co. v. Portland, 74 Ore.
260; 154 Pac. 410:

"An ordinance providing for the inspection of meats and slaughter houses located without the city as a condition precedent to the sale of products within the city, but exempting slaughter houses and packing plants subject to federal inspection laws, is invalid in so far as it prescribes higher inspection regulations than those fixed by federal rules."

State v. LeBaron (Wyo.), 162 Pac. 265:

"Act limiting hours of labor for females is unconstitutional so far as applying to restaurants as class legislation under the constitution of the United States, amendment No. 14, because applying to all hotels and restaurants except 'those operated by railroad companies,' the distinction being arbitrary and unreasonable."

American Digest, decennial edition, Vol. 4,
Constitutional Law, p. 1752;

State v. Santee, 82 N. W. 445; 111 Iowa 1;
53 L. R. A. 763; 82 Am. St. Rep. 489.

Sams v. St. Louis & M. R. R. Co., 174 Mo.

53; 73 S. W. 686; 61 L. R. A. 475:

“Where there are two concerns engaged in precisely the same business and both conducting it in precisely the same manner, *a statute which would undertake to impose a liability on the one and not on the other* could not be sustained in the face of either our state or federal Constitution.”

Park v. Detroit Free Press Co., 40 N. W.

731; 72 Mich. 560; 1 L. R. A. 599; 16 Am.

St. Rep. 544:

“*It is not competent for the legislature to give one class of citizens legal exemption from liability for wrongs not granted to others;* and it is not competent to authorize any person, natural or artificial, to do wrong to others without answering fully for the wrong.”

Kane v. Erie R. Co., 133 F. 681; 67 C. C. A.

653; 68 L. R. A. 788:

“A valid classification for legislative purposes must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any just basis. It must be grounded upon a reason of a public nature, and the act must affect all who are within the reason for its enactment.” Judgment (C. C.) 128 F. 474, reversed.

Statute Vague.

Again the statute is open to constitutional objection on the ground that its terms are vague and not susceptible of definition.

The state argued that because the Communist Labor Party of Oakland endorsed the platform of the National Communist Labor Party, and the National Communist Labor Party endorsed Bolshevism, it was therefore permissible to introduce in evidence unauthenticated manifestoes of the Bolshevik Party of Russia to show the character of the Communist Labor Party of Oakland (page 49).

This being true, then it would be the duty of the District Attorney of Alameda County immediately to cause the arrest and prosecution as a criminal syndicalist of every person who joined the Friends of Irish Freedom. It would be proper to introduce in evidence the resolutions of this organization endorsing the struggle of the Irish people for liberty. It would then be proper to introduce in evidence the manifestoes of De Valera and the Irish Republican Government, forbidding Irishmen to pay taxes to England, and to combat English military forces with violence. Thus the Friends of Irish Freedom in Oakland would be proved to have endorsed violence in the accomplishing of political change and would be criminal syndicalists.

But this petitioner will freely submit to the honorable court that it will never be called upon to sustain or reverse the conviction of a Friend of Irish Freedom as a criminal syndicalist. The reasons for our confident prediction need not be expatiated upon. Everyone knows that if the abhorred provision of the criminal syndicalism law were enforced or attempted to be enforced against those sympathizing with the struggles of Ireland against barbarity and tyranny, the entire law would be blotted out of the statute as a special session of the legislature if the law-making body did not happen to be convened in regular session.

Another anomalous situation might arise in connection with our criminal syndicalism law, as follows:

The accredited representatives of the Soviet Government of Russia have just concluded a conference at Genoa at which they met on equal terms with the accredited representatives of the Emperors of Great Britain, the Republic of France, the Kingdom of Italy and all other recognized European governments, as well as with the accredited representatives of the Emperors of Japan.

It is true that so-called formal recognition of the Soviet Government of Russia has not yet been accorded. It is likewise true, however, that those

accredited representatives of Russia have entered into engagements with the Governments of other nations, and have been even dignified by invitations to dine with the eminently sane King of Italy.

What a perplexing situation it would prove to be under our criminal syndicalism law if revolt should break out in Russia against the regime of Lenine and Trotsky.

Suppose that this revolutionary movement should organize an army to carry on the bloody struggle which would be necessary to overthrow the autocratic Bolshevist regime, backed up by its hordes of disciplined red troops.

By the same process of reasoning that the Bolshevikic manifestoes were read into evidence at the trial of Charlotte Anita Whitney, any political party in America endorsing the efforts to throw off the tyranny of Lenine and Trotsky could be proscribed under the criminal syndicalism law.

Any person joining such a party and giving voice to the hope that such a force might overthrow by violence the present Government of Russia would be guilty of criminal syndicalism.

CONCLUSION.

The political features of the original syndicalism law of the State of California today, it is respectfully urged, are not only unconstitutional, but repugnant to every American ideal of freedom of thought and freedom of speech.

It is respectfully submitted that a hearing by this court of the case of the People v. Whitney should be granted.

Dated, San Francisco,

June 3, 1922.

Respectfully submitted,

JOHN FRANCIS NEYLAN,
NATHAN C. COGHLAN,

Attorneys for Appellant
and Petitioner.

(Appendix Follows.)

APPENDIX.



APPENDIX.

*In the District Court of Appeal
State of California
First Appellate District*

DIVISION ONE.

Criminal No. 907.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

VS.

CHARLOTTE A. WHITNEY,
Defendant and Appellant.

OPINION.

This appeal is from a judgment of conviction of the defendant for the alleged violation of the provisions of the Criminal Syndicalism Act. The information filed by the district attorney against the defendant consisted of five separate counts based upon the several subdivisions of said act. The jury found the defendant guilty as to the first count in the information, but disagreed as to the other counts therein, and dismissals as to these were subsequently filed. The charging part

of the first count in said information upon which the conviction of the defendant was had is in the language of the statute and reads as follows:

“The said Charlotte A. Whitney prior to the time of filing this information, and on or about the 28th day of November, A. D. nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlawfully, wilfully, wrongfully, deliberately and feloniously organize and assist in organizing, and was, is, and knowingly became a member of an organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism.”

The first contention of the appellant herein is that said first count in said indictment, of which the foregoing excerpt is the charging part, was insufficient to state a public offense, the alleged particular insufficiency therein being its omission to specifically designate the name of the organization, society, group or assemblage of persons which she is charged with having organized and assisted in organizing and which were organized and assembled to teach, aid and abet criminal syndicalism. Since the original submission of this cause the Supreme Court has decided the case of *People v. Taylor*, 62 Cal. Dec. 546, covering the

precise point which the appellant urges upon this contention. The two cases are identical as to the form of the charge and as to the procedure with relation to the trial thereon in the trial court. In each case the defendant was fully advised upon the *voir dire* examination of the jurors and in the opening statement of the district attorney that the organization which the defendant was charged with having organized and assisted in organizing in violation of the terms of the Criminal Syndicalism Act was the Communist Labor Party of Oakland, a local branch of the Communist Party of California. This being so, we are bound, in conformity with the decision in *People v. Taylor*, *supra*, to hold that the appellant's first contention is void of merit.

The next contention which the appellant urges upon this appeal is that the evidence is insufficient to justify her conviction upon said count in the information. The record is voluminous and no useful purpose would be subserved by a detailed review of the evidence which it contains. Upon the main question, however, as to the part which the defendant took in organizing and assisting to organize the Communist Labor Party, there is no dispute. In the brief of the appellant upon this appeal it is stated to be an "admitted fact that

the defendant became a member of the so-called Communist Labor Party, attended a party convention Nov. 9th, 1919, and was one of the committee on resolutions which reported the platform hereinabove set forth." In addition to the foregoing admission the evidence abundantly shows that the defendant not only took a leading and active part in the organization of the Oakland branch of the Communist Labor Party of California, but also in the subsequent meetings and acts of said organization. Notwithstanding this admission and these proofs, the appellant insisted upon the trial of the cause and now insists that said organization was not of such character and purposes as to bring it within the class of organizations forbidden and condemned by the terms of the Criminal Syndicalism Act. It was upon this branch of the case that the larger part of the evidence adduced on behalf of the prosecution upon the trial of this cause was presented. It is the appellant's contention that the admission of a very large portion of such evidence designed to show the pernicious activities of other organizations with which the Communist Labor Party of California was affiliated, or regarding which, or the membership of which, it from time to time by resolution or otherwise expressed its approval and sympathy, was highly prejudicial

to the defendant's case, particularly in view of the fact that as is claimed her knowledge of and participation in these baneful activities was not sufficiently shown. As to the propriety of the admission of such evidence as tending to show the character and purposes of the Communist Labor Party of California there can be no further doubt, in view of the very full discussion of this subject in the case of *People v. Taylor, supra*, and of the determination of the Supreme Court therein. As to the knowledge which the defendant had and of her participation in the aims, expressions and activities of the Communist Labor Party of California there can also be no doubt, in view of the admitted intelligence of the defendant and of her participation in the drafting of the resolutions and formulation of the constitution of the organization itself. That this defendant did not realize that she was giving herself over to forms and expressions of disloyalty, and was, to say the least of it, lending her presence and the influence of her character and position as a woman of refinement and culture to an organization whose purposes and sympathies savored of treason, is not only past belief but is a matter with which this court can have no concern, since it is one of the conclusive presumptions of our law that a guilty intent is

presumed from the deliberate commission of an unlawful act. (Code Civ. Proc., sec. 1962.)

As to the appellant's only remaining contention with relation to the alleged misconduct of the district attorney upon the examination of a juror, we have examined the record and do not find that the episode complained of was of such prejudicial character or consequence as to justify a reversal of the case.

Judgment affirmed.

RICHARDS, J.

We concur:

TYLER, P. J.

KERRIGAN, J.

Filed April 25, 1922,

J. B. Martin, Clerk.

SEP 5 1925

To be Argued **Wm. R. STANSB**
WALTER H. POLLAK. CL

IN THE
Supreme Court of the United States

October Term, 1925—No. ~~10~~ 3

CHARLOTTE ANITA WHITNEY,
Plaintiff-in-Error,

against

THE PEOPLE OF THE STATE OF
CALIFORNIA,
Defendant-in-Error.

**IN ERROR TO THE DISTRICT COURT OF
APPEAL, FIRST APPELLATE DISTRICT,
DIVISION ONE, STATE OF CALIFORNIA.**

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IN THE
Supreme Court of the United States
October Term, 1925—No. 10.

CHARLOTTE ANITA WHITNEY,
Plaintiff-in-Error,

against

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant-in-Error.

**IN ERROR TO THE DISTRICT COURT OF
APPEAL, FIRST APPELLATE DISTRICT,
DIVISION ONE, STATE OF CALIFORNIA.**

Brief for Plaintiff-in-Error.

The appeal is from a conviction under the Criminal Syndicalism Law of California. An information was filed against Miss Whitney, charging her in five counts, following the language of the five sections of the statute, with all the offenses by that statute condemned. On none of the charges of personal participation—the advocacy or furtherance of forbidden doctrines—was she

convicted. She was found guilty upon the first count alone, which charged her with having organized, or become, or been a member of some unnamed party or assemblage. Miss Whitney's personal connection was a wholly innocent one. The only questionable organization she had anything to do with was an organization in the process of formation. To that organization she and the Resolutions Committee on which she served attempted to give a strictly political and admittedly innocent character. The resolution she helped to prepare and which she herself read to the convention was, however, rejected, and the organization was thus, over her opposition, given a quality which the California courts have condemned. The indefiniteness of the charge from beginning to end of the prosecution and the innocent character of Miss Whitney's own acts, are the foundation for her contention that, as applied to her case, the California Criminal Syndicalism Law, and in particular its prohibitions upon assemblage and membership, violate the Fourteenth Amendment of the Constitution of the United States.

.

The writ of error (page 12) reviews the judgment of the District Court of Appeal, First Appellate District, Division I of the State of California (opinion reported 57 Cal. App., 449), dated April 25, 1922 (Record, page 1) affirming the conviction. The Supreme Court of California, without opinion, denied a petition for leave to appeal to that Court (page 1); two of the seven judges dissented and one judge was absent.

Specific claims advanced, and rulings made in the California Courts, relied upon as the basis of this Court's jurisdiction.

By demurrer to the information (pages 65-66)—by motion for a bill of particulars (pages 59-64)—by motion for a directed verdict after the opening statement of the District Attorney (page 73)—by motion to compel an election (pages 305-307)—by requests at the close of the case that the Court instruct the jury to bring in a verdict of not guilty (page 31)—by motions after verdict for a new trial and in arrest of judgment (page 30)—Miss Whitney's counsel before trial, during the trial, and after the trial challenged the sufficiency and the definiteness of the accusation upon which she was convicted. The ruling in each case was against her (pages 17-18; 30-31; 307).

Miss Whitney's counsel requested the trial court to charge that there could be no conviction under any section of the statute in the absence of a showing of personal participation in, and furtherance of, a seditious intention (page 33; see also page 17, this brief *infra*, footnote). The court, however, charged in effect (page 40) that membership or presence *per se*—without regard to her intent in joining or attending, and without inquiry whether her purpose was to give a lawful or unlawful character to the body then in process of organization—could be made the basis of conviction* This theory of guilt the Cali-

*By Section 1259 of the Penal Code of California, the need of exceptions in criminal cases, and with respect to "any instruction given, refused or modified" the need of objections is done away with when an appeal is taken in open court, as

fornia District Court of Appeal in terms approved (page 4).

In the District Court of Appeal and also upon her application for leave to appeal to the Supreme Court of California, Miss Whitney contended that the statute "and its application in this case is repugnant to the provisions of the Fourteenth Amendment of the Constitution of the United States—providing that no state shall deprive any person of life, liberty or property, without due process of law, and that all persons shall be accorded the equal protection of the laws" (*Stipulation and addition to the record*, filed Dec. 16, 1924, and printed as pages 338-339). That contention "was considered and passed upon" by the District Court of Appeal—the highest California Court to which appeal was permitted (see page 1)—and was overruled by that court (*Order amending record*, page 337).

Statutory provisions under which the jurisdiction of this Court is invoked.

Judicial Code, Section 237, provides:

"A final judgment * * * in any suit in the highest Court of a State in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Con-

Miss Whitney's was (pages 29-30); see also Section 1176. (Sections 1259 and 1176 are printed in the appendix to this brief as Appendix C.)

stitution * * * of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

Cases sustaining jurisdiction.

That writ of error lies to the judgment of the California District Court of Appeal in this case, see

Gregory vs. McVeigh, 23 Wall., 294;

and compare

Davis vs. L. L. Cohen & Co., Inc., Adv. Op., 69 L. Ed., July 1, 1925, page 702.

That a decision against a claim of Federal right in the State Court of last resort is sufficient to give this Court jurisdiction, see

Chicago R. I. & Pac. Co. vs. Perry, 259 U. S., 548.

That the raising of the Federal question and its determination by the State Court of last resort may be shown by certificate of that Court, "made part of the record by that Court," see

Cincinnati Packet Co. vs. Bay, 200 U. S., 179, page 182.

Compare

Consolidated Turnpike Co. vs. Norfolk, etc., Railway Co., 228 U. S., 596.

Statement of the Case.

California Criminal Syndicalism Act.

The verdict of guilty (page 30) was upon the first count which, in the general language of the statute (California Criminal Syndicalism Act—Stat. 1919, page 281), charges a violation of Section 2, Subdivision 4, thereof.*

Criminal Syndicalism is defined in the first section of the statute as follows:

“The term ‘criminal syndicalism’ as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.”

Subdivision 4 of Section 2, for violation of which plaintiff-in-error was convicted, is as follows:

“Any person who

 Organizes or assists in organizing, or is
 or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism

*The whole statute appears as Appendix A.

Is guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than fourteen years."

The basic facts upon which Miss Whitney's appeal rests are, as we have seen, two: the fact namely that at no time was she—or the jury—informed in any precise manner of the accusation against her upon this count, and the fact that her personal connection and personal activity were in every respect innocent. The nature of these contentions involves a rather detailed review of the proceedings before and at the trial, and of the opinion of the California District Court of Appeal. The whole story of the proceedings in Miss Whitney's case is as follows:

The Information.

The information against Miss Whitney was filed on December 30, 1919 (page 14). All five counts are drawn in the language of the statute. The first, which alone resulted in conviction, charges that

"the said Charlotte A. Whitney prior to the time of filing this information, and on or about the 28th day of November, A. D., nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlawfully, wilfully, wrongfully, deliberately and feloniously organize and assist in organizing, and was, is, and knowingly became a member of an organization, society, group and assemblage of persons organized

and assembled to advocate, teach, aid and abet criminal syndicalism" (page 15).

The second, third, fourth and fifth counts—all of which failed (pages 30, 54-55)—charge respectively the publication and circulation of printed matter advocating criminal syndicalism; the advocacy and teaching "by personal conduct"; the justifying and attempting to justify criminal, violent and unlawful methods "by spoken and written words"; and the unlawful, wrongful, wilful, deliberate and felonious practice and commission of forbidden things by "personal acts" (pages 14-16)*.

The date of each of the offenses is given as "on or about the 28th day of November," 1919 (pages 15-16).

No organization is named anywhere in the information.

Demurrer to information overruled and bill of particulars denied.

Miss Whitney first demurred to the information, and to the first count thereof, on the grounds, among others, "that it contains no statement of the acts constituting the alleged offense in ordinary or concise language or in such manner as to enable a person of common understanding to know what is intended" and "that the facts stated do not constitute a public offense for the reason that the purported statute therein referred to is void, invalid, and unconstitutional" (pages 65-66). The demurrer was overruled (page 18).

*The whole information is annexed to this brief as Appendix B.

Defendant thereafter moved for a bill of particulars. The motion was denied (pages 59-64, 18).

District Attorney's Opening.

The trial commenced on January 28, 1920, within a month after the filing of the information (page 70). The district attorney in two pages professed to give "a very brief synopsis of the case that the People of the State of California intend to prove" (page 70)—a case which then embodied five counts and covered the entire range of the statute. He mentioned a number of organizations, assemblages and groups,—the Socialist Party and a radical wing of it (page 70); delegates from Oakland to a convention in Chicago (page 71); a convention in Oakland of a party "which was termed the Communist Labor Party"* (page 71); the I. W. W. (page 72). Nowhere did he state in clear language which of these bodies Miss Whitney was charged with organizing; which she was charged with membership in; which she was charged with assembling with.**

*The evidence subsequently applied the term "Communist Labor Party" to at least three bodies of one sort or another, Local Oakland (which remained an independent body up to the time of the trial), the California party which was organized at a convention in Oakland, and a national party organized in Chicago (*infra* this brief, pages 10-13).

**The emphasis of the opening was largely upon personal advocacy charged in the other counts. The District Attorney's statement (page 72) that incendiary or objectionable literature was found in Miss Whitney's home was absolutely unsubstantiated by the evidence subsequently received or offered and the jury did not convict on the counts which charged this.

(Footnote continued on next page.)

Defendant's counsel moved for a directed verdict after this opening, and the motion was denied (pages 72-73).

Evidence.

Plaintiff-in-error had been a member of Local Oakland (pages 117-118), a local branch of the Socialist organization (pages 119, 189). This local sent delegates to the National Convention of the Socialist Party held in Chicago on August 30 and September 1, 1919 (page 205). Plaintiff-in-error voted for these delegates (pages 205-6); the election was by written ballot circulated among the members—not at a meeting (page 206). At the Chicago Convention the “radicals” were ejected; they went to another hall and formed the Communist Labor Party of America (page 100). The delegates sent by Local Oakland “went over” to this group (page 100). Local Oakland thereafter withdrew from the Socialist Party (pages 153, 155) and after receiving some communication or communications from the Communist Labor Party of America (pages 153-155, 158), and an announcement from Local San Francisco that a convention would be held in Oakland on No-

The reference in the District Attorney's opening to the “red flag” (page 71) was subsequently explained. At one of the sessions of the meeting of November 9th, there was a red table cloth hung over the American flag (page 92). The witness Condon who testified to this incident admitted on cross examination that Captain Thompson of the police force had stated to him that he had one of his men drape the table cloth in this way (pages 108-109; 113-115). Captain Thompson subsequently denied that *he had told the witness* that “he had a man to do that thing” (page 148). However, the red flag incident “went out” of the case (page 109) on the express statement of the District Attorney.

vember 9, 1919, to decide upon a state organization (pages 82; 153-4) Local Oakland sent delegates to this state Oakland convention, among them plaintiff-in-error (pages 151, 152). Although the convention resulted in the organization of the Communist Labor Party of California, Local Oakland up to the time of the trial maintained its independent character and had not applied for a charter as a local of the Communist Labor Party (page 156), nor ratified the action of the convention (page 190). While the Local thus tentatively adopted the Communist Labor name, it never joined the state organization, and therefore did not and, indeed, could not belong to the national body either (pages 154, 184).

Plaintiff-in-error attended this state convention which was held on November 9, 1919, at Loring Hall in Oakland (pages 74, 81, 87, 151, 309), and took part in the convention as chairman of the Credentials Committee (83, 113, 308) and as a member of the Resolutions Committee (87, 309).

While the constitution was still in the hands of the Committee on the Constitution, and before the presentation or adoption of any resolution, defendant was elected to serve as one of two alternate members on the State Executive Committee (page 121).

Miss Whitney's resolution for political action and its defeat.

One of the resolutions which plaintiff-in-error's Committee presented and which she herself read to the convention (page 309) is as follows:

“The C. L. P. of California fully recognizes the value of political action as a means of spreading communist propaganda; it insists that in proportion to the development of the economic strength of the working class, it, the working class, must also develop its political power. The C. L. P. of California proclaims and insists that the capture of political power, locally or nationally by the revolutionary working class can be of tremendous assistance to the workers in their struggle of emancipation. Therefore, we again urge the workers who are possessed of the right of franchise to cast their votes for the party which represents their immediate and final interest—the C. L. P.—at all elections, being fully convinced of the utter futility of obtaining any real measure of justice or freedom under officials elected by parties owned and controlled by the capitalist class.

Signed by the Whole Committee, H. L. Griest, Chairman. W. H. Eichhorn, J. G. Wieler, D. D. Wemich, Charlotte Anita Whitney, Edw. R. Alverson” (pages 101-2, see also 123).

The resolution thus bore Miss Whitney’s signature, and there is no question that it had her personal approval (page 309).

The critical importance of this resolution in the case this Court will at once recognize: It is “unlawful methods” of political or industrial change that the statute penalizes, and the District Attorney in his opening stressed the contrast between

changes "by the ballot, by political method" and "by industrial action," "direct action" (page 70).

This resolution naturally aroused much controversy among the delegates (pages 121, 142),—"a tong war broke out" (page 142). The proposal was strongly opposed on the ground "that the adoption of this resolution would have undone all that the Communist Labor Party Convention at Chicago had put down in their platform and program, and again lined us up with the Socialist Party from which we had just escaped" (page 142). It was voted down and *in its stead* (page 121) was adopted the program of the Communist Labor Party of America (pages 171-188) which, to adopt the characterization of the secretary, "clearly defines that the ballot is practically worthless as an instrument of emancipation and we must look to organizing the workers industrially as our great weapon of offense and defense" (page 142).

* * * * * *

The prosecution went on to prove a number of other and distinct incidents—whether as characterizing the Oakland Convention or as substantive bases of accusation neither the District Attorney nor the Court ever explained to the jury.

There was a scrap of testimony that Miss Whitney in the capacity of an alternate attended a meeting of the Executive Committee of the California Communist Labor Party in San Jose in December, 1919 (pages 125, 127, 150), and a meeting in San Francisco in January, 1920 (pages 127, 150). No particulars were given of what the committee did on any of these occasions, and

there was no testimony that Miss Whitney did anything (pages 126-7).

There was evidence by a police officer that on one occasion in November, one in December and one in January he had seen Miss Whitney in that part of the building called Loring Hall which he said was occupied by the Communist Labor Party, and that he saw other members "coming and going" (page 206).

The prosecution, as our references to the District Attorney's opening have indicated, made repeated effort in some way to drag the I. W. W. into Miss Whitney's case. Acts of violence by certain members of the I. W. W. (pages 228, 258-9, 262-71, 290, 294) and the incendiary nature of its literature (pages 225-7, 234, 256) were proved. There was, however, not an item of evidence that defendant had ever attended a single meeting of that body, or any branch of it, much less that she was a member of it or had organized or had helped to organize it. There was a shred of evidence merely that on one or two occasions in July and August, 1918 (pages 274, 282) she had been at the headquarters of the I. W. W. in San Francisco and had spoken to the secretary of that organization in regard to circulating defense cards (pages 274, 281).

The foregoing is the whole story of Miss Whitney's activities. The Communist Labor Party of California was in process of organization and she tried to give it a character which the majority of those present at the meeting of November 9, 1919, refused to accept. Its organization was only that day undertaken and Miss Whitney's connection with it continued so vague and so ill-de-

fined that even up to the time of the trial she apparently had not signed a membership card (compare page 193), although she declared herself at that time to be a member—whether of some local, or of the state, or of the national body does not appear (page 310). (She had signed a “temporary card” which one “had” to take out in order to attend the convention of November 9 [pages 190-1.])

No proof was offered that plaintiff-in-error ever advocated the use of violence, terrorism or any other unlawful measure to effect political change, or that she intended to assist or promote any act of criminal syndicalism or any other unlawful act. The evidence was all directly to the contrary (page 136, compare 137; pages 309, 335).

Trial Court's refusal to require an election by the prosecution and failure to identify the organization.

At the close of the trial the court—which had previously overruled various objections that recited the ignorance of the defense of “what this lady is being tried for” (pages 283; 291)—declined to require the prosecution to elect and designate the specific offense under the first count which the District Attorney desired to submit to the jury (pages 305-7).

The charge of the trial judge with reference to this count repeated the language of the section (pages 43-4), without separately presenting the various offenses covered by the section, and designated no specific organization to which defend-

ant was accused of belonging and no specific act or occasion constituting the offense. He did not instruct the jury that the evidence concerning other parties and organizations than the Communist Labor Party of California was to be taken into consideration only in determining the nature of that party, but left the identity of the organization whose character was to be determined, altogether uncertain. The instruction on this point was as follows:

“Evidence has been admitted in this case of statements, acts and declarations of persons other than the defendant, and not made and done in the presence of the defendant, and of printed matter purporting to be printed matter of the I. W. W. and of the Communist Labor Party, or circulated or publicly displayed by the I. W. W. and by the Communist Labor Party, and taken from places and at times at which the defendant was not present, and which was not directly connected with the defendant, and which the evidence does not show was circulated, printed or publicly displayed with her acquiescence or consent. Evidence has also been admitted of other objects which are not directly connected with the defendant.

The Court instructs you that such evidence was admitted for but one purpose, and is to be considered by you for that one purpose only, and that is to determine the character of the organization of which it is claimed the defendant was a member, or which it is claimed she organized or assisted in organizing * * * (page 46).”

What "organization" was thus "claimed," the judge stated neither at that point of the charge nor at any other.

Charges and requested charges on the subject of intent.

The trial court was requested to charge the jury

"that in this case to constitute any crime there must exist a union or joint operation of act and intent";

and the further instruction was requested:

"I charge you that you must not convict in this case unless convinced beyond all reasonable doubt that defendant had a criminal intent of doing an act forbidden by the law under which this prosecution is brought" (Record, page 33).*

*In the list of requested instructions submitted by defendant was also the following on the question of intent:

"One of the charges brought against this defendant is that she knowingly became a member of an organization organized to advocate criminal syndicalism. Before she can be convicted of this charge every member of the jury must be convinced beyond all reasonable doubt not only that the organization in question was organized for such criminal purpose, but also that the defendant knew that it was organized for such criminal purpose * * *."

This requested instruction was perhaps accepted by the judge when submitted, as it is marked "given as modified" (page 33). It was not, however, given to the jury in any form (see pages 38-48; and especially 40).

These sentences appear in weakened form in the charge as given: The court added "criminal negligence" as a possible alternative to "intent" in the first, and omitted "criminal" before "intent" in the second. He immediately added sentences whose effect was, that intent was to be deduced from soundness of mind and that soundness of mind could be predicated of all but idiots and lunatics. As actually given the charge on this subject reads as follows:

"I charge you that you must not convict in this case unless convinced beyond all reasonable doubt that defendant had an intent of doing an act forbidden by the law under which this prosecution is brought.

In every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence. The intent or intention is manifested by the circumstances connected with the offense and the sound mind and discretion of the accused.

All persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity.

It is a presumption of law that an unlawful act is done with an unlawful intent.

A malicious and guilty intent is always presumed from the deliberate commission of an unlawful act for the purpose of injuring another.

While it is true that the law presumes that every man intends the natural consequences of his acts knowingly and deliberately committed, in a case like this, the pre-

sumption is not conclusive but is probitary [sic] in character. It is for the consideration of the jury in connection with all the other evidence in this case, to the end that you may determine the real intent of the party in doing what you may find she did do. You may infer the intent from the character, and the natural, ordinary, necessary consequences of the acts done. The defendant's intent is to be determined from all the evidence" (page 40).

Unsuccessful attempt at identification of the organization by the District Court of Appeal, and affirmance and perpetuation of the trial court's ruling that guilty purpose could be presumed from mere membership or presence.

The District Court of Appeal took note (page 3) of defendant's contention that there had been an "omission to specifically designate the name of the organization, society, group or assemblage of persons which she is charged with having organized and assisted in organizing." Judge Richards declared however that "upon the *voir dire* examination of the jurors and in the opening statement of the District Attorney," the defendant "was fully advised" "that the organization which the defendant was charged with having organized and assisted in organizing in violation of the terms of the Criminal Syndicalism Act was the *Communist Labor Party of Oakland*, the local branch of the Communist Party of California" (page 3). He went on to say that "the evidence abundantly shows that the defendant not

only took a leading and active part in the organization of the *Oakland Branch* of the Communist Labor Party of California, but also in the subsequent meetings and acts of said organization" (page 4).

This is exactly what the evidence does *not* show. There was no evidence concerning the organization of "the Oakland Branch of the Communist Labor Party of California." Local Oakland never applied, even up to the trial, for a charter in the Communist Labor Party (page 156; compare page 166), and never ratified the action of the State Convention (page 190) or had a report concerning it (pages 190, 157). There was no proof of any resolution, platform or program ever adopted at any meeting—whether before or after November 9, 1919—by the Oakland Local. There was affirmative evidence that ~~Miss Whitney~~ attended no meeting of Local Oakland after the state convention of November 9 (pages 189, 192). There was no proof, again, of any of the circumstances of Miss Whitney's joining Local Oakland—for example, whether it was before the passage of the Criminal Syndicalism Law in April, 1919, or after—and no proof that she ever in her life attended a single meeting of the body. The only evidence concerning Miss Whitney's connection with Local Oakland was the proof that in August, 1919, she voted by written ballot as a member of that local for delegates to the convention of the Socialist Party of America (pages 205-6); that she was a delegate from Local Oakland to the convention which on November 9, 1919, was held to organize the Communist Labor Party of California (page 152); and that on two or three oc-

casions after November 9, 1919, she was seen by a police officer in Loring Hall when no meeting was in progress, but when members of Local Oakland were "coming and going" (page 206).

To the convention on November 9, 1919, at which the state party was organized and which Miss Whitney attended, the Appellate Court referred in a casual sentence near the close of the opinion (page 4). That casual sentence is in each of its particulars wholly erroneous. Judge Richards there speaks of "her participation in the drafting of the resolutions and formulation of the constitution of the organization itself." The record does not disclose that Miss Whitney had any part in the "formulation of the constitution"; she was not on the constitution committee (page 119). Her "participation in the drafting of the resolutions" consisted in the preparation and submission of a resolution of admittedly innocent character which the convention rejected (*Supra*, pages 11-13).

Judge Richards who failed to apprehend both the identity of the organization and the quality of Miss Whitney's connection with it, speaks of "an organization whose purposes and sympathies savored of treason" (page 4). The organization truly involved—had the accusation been at any time particularized, was an organization which had *no* "purposes and sympathies," a temporary organization—an organization whose purposes and sympathies were necessarily in the making and which Miss Whitney tried, though in vain, to make innocent beyond all question.

It thus remains wholly true that even after trial and in the "highest court of the state" to

which Miss Whitney's appeal ran, both the identity of the organization and the occasion of her connection remained undefined and were in fact misconceived.

The short opinion substantially concludes (page 4) with an explicit reaffirmation of the trial Court's declaration that the question of Miss Whitney's personal guilt—the inquiry whether she furthered or opposed those purposes which the organization finally adopted and which the Court condemned—was immaterial.

“That this defendant did not realize that she was giving herself over to forms and expressions of disloyalty and was, to say the least of it, lending her presence and the influence of her character and position as a woman of refinement and culture to an organization whose purposes and sympathies savored of treason, is not only past belief *but is a matter with which this Court can have no concern, since it is one of the conclusive presumptions of our law that a guilty intent is presumed from the deliberate commission of an unlawful act.*” (Our italics.)

Assigned Errors Urged.

Plaintiff-in-error urges the following errors assigned (pages 8-11):

That the Supreme Court of California when it refused to grant leave to appeal, the District Court of Appeal when it affirmed, and the Superior Court when it rendered judgment de-

nied her the equal protection of the laws (Assignments I, II and III); that the Superior Court erred in overruling her demurrer to the indictment, and in denying her motion to set aside the information, and in denying her motion for a new trial, and in denying her motion for a bill of particulars (Assignments IV, V, VI, VII), and that the District Court of Appeal, erred in affirming these rulings (Assignment VIII); and finally that the Superior Court and the District Court of Appeal, erred in holding that the statute was not a violation of the due process and equal protection of the laws provisions of the Fourteenth Amendment (Assignments IX, X) and that the California Supreme Court erred in failing to grant an appeal and in failing to hold the judgment of conviction a denial of constitutional rights under the Fourteenth Amendment (Assignment XI).

OUTLINE OF POINTS.

Our argument, as we have already indicated, rests upon two general contentions: In Points I and II we shall show that the conviction would have been a denial of due process even had the statute been admittedly valid and even had facts been proved which could constitutionally be punishable,—the failure ever to specify the accusation invalidated the conviction. In Points III-X we shall submit various reasons why Miss Whitney—even had the prosecution been wholly specific and perfect in form—could not constitutionally be convicted because of the quality which other persons over her protest gave to the organization she joined. Briefly stated our points are as follows:

I. The failure alike in the information and at every subsequent stage of the proceedings to identify either the organization or occasion of which guilt was sought to be predicated, makes her conviction a denial of due process (*Hodgson vs. Vermont*, 168 U. S., 262) (pages 27-37).

II. Although the record showed only one occasion of organization, membership or assemblage on Miss Whitney's part in Alameda County after the passage of the Criminal Syndicalism Act—namely, the convention of November 9, 1919—the court submitted to the jury without discrimination many other incidents whose consideration as substantive bases of guilt should have been absolutely excluded (pages 38-46).

III. Miss Whitney's act in attending the convention of November 9, 1919, cannot constitutionally be made punishable by reason of "a subsequent event" brought about against her will, by the agency of others (*U. S. vs. Fox*, 95 U. S., 670) (pages 47-51).

IV. The crime which the Criminal Syndicalism Law, Section 2, subdivision 4, defines, has been recognized by the California Courts as a crime of conspiracy; to that crime a specific and "corrupt" intent to join in the forbidden purpose of the combination is an essential; that essential cannot constitutionally be supplied, in opposition to proved and undisputed facts, by statutory presumption (*McFarland vs. American Sugar Co.*, 241 U. S., 79) (pages 52-60).

V. The statute as construed and applied in this case is so indefinite that a conviction under it is a denial of due process. To adjudge Miss Whitney guilty of felony because she failed to foresee the quality others would give to the convention of November 9, 1919, is to inflict criminal penalties by reason of a lack of "prophetic" understanding (*International Harvester Co. vs. Kentucky*, 234 U. S., 216) (pages 61-65).

VI. The statute as applied in this case is a "previous restraint" upon assembly and invalid within the analogy of *Patterson vs. Colorado*, 205 U. S., 454 (pages 66-69).

VII. The statute as applied in this case is as well a previous restraint upon free speech (*Patterson vs. Colorado*, 205 U. S., 454) (pages 70-71).

VIII. The statute as here applied is a violation of the right of association, which is an element of liberty protected by the Fourteenth Amendment (*Meyer vs. Nebraska*, 262 U. S., 390) (pages 72-74).

IX. No quality of incitement attaches to the proceedings of the convention of November 9, 1919, and no conviction by reason of the convention that day held could constitutionally have been had even if Miss Whitney had shared the purposes of the majority (*Gitlow vs. New York*, 45 Sup. Ct., 625) (pages 75-79).

X. The Criminal Syndicalism Law, Section 2, subdivision 4, unfairly discriminates between different political and economic opinions and denies the equal protection of the laws (*Truax vs. Corrigan*, 257 U. S., 312) (pages 80-81).

POINT I.

The case was submitted to the jury and the conviction was affirmed by the District Court of Appeal without any specification of the assemblage, group, occasion or connection of which guilt was predicated. The information named no group or party but merely charged organization, assembly and membership in the general language of the statute. A demurrer to it was overruled and a bill of particulars denied. The District Attorney never particularized the accusation in his opening and neither he nor the Court did so while the evidence was being received. A motion to compel the prosecution to elect was overruled, and the Judge's charge did not identify the party, group, or occasion of which guilt was predicated. The failure to apprise the defendant of the charge against her thus continued from beginning to end of the proceedings; after verdict and affirmance it remains today uncertain of what offense Miss Whitney has been convicted and whether upon the same state of facts she could not be convicted again. The result is a denial of due process under the doctrine of *Hodgson vs. Vermont*, 168 U. S., 262.

Miss Whitney relies upon several aspects of the due process principle and relies in this first point upon that principle in its simplest form. The information never apprised her of the accusation against her and the subsequent rulings of the court, instead of clarifying the matter, confused it still further. The result was a denial of her right under the Fourteenth Amend-

ment within the test carefully laid down by this Court in *Hodgson vs. Vermont* (168 U. S., 262).

In that case the state's attorney of Vermont filed an information against Hodgson charging that on a day and at a place named he "did at divers times, sell, furnish and give away intoxicating liquor without authority, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state." The individuals to whom sales were made were not named. At the same time the state's attorney filed specifications which gave the names though without addresses. This Court approved the holding of the Vermont Supreme Court that the specification to which defendant was entitled "as a matter of right" (page 272) supplied the defects in the information. Speaking upon the general principles of the subject, it noted defendant's insistence

"that in all criminal prosecutions the accused must be informed of the nature and cause of the accusation against him; that in no case can there be, in criminal proceedings, due process of law where the accused is not thus informed, and that the information which he is to receive is that which will acquaint him with the essential particulars of the offense, so that he may appear in court prepared to meet every feature of the accusation against him" (page 269).

And this Court went on to concede "*that this is a correct statement of the rights of an accused person, and that, if deprived of such rights, he*

may properly invoke the protection of the Constitution of the United States" (page 269); and again (pages 272-3):

"We concede the proposition, so earnestly urged on behalf of the plaintiff-in-error, that by the Fourteenth Amendment it is made the right and the consequent duty of this court, when a case has been duly brought before it, to inquire whether, in the enactment and *administration* of the criminal laws of a State, it is sought to arbitrarily deprive any person of his life, liberty or property, or to refuse him the equal protection of the laws, and that such inquiry is not precluded or ended by the mere fact that the judgment complained of was reached by proceedings in a state court in pursuance of the provisions of a state statute." (Our italics.)

The principles of the subject are then wholly clear:

A defendant in a criminal case must be apprised of the nature of the accusation against him; if he is not so apprised, the result is a denial of due process. If the information is vague, specifications may supply the lack. But apprised the defendant must be.

It remains then merely to test the instant prosecution by these simple principles:

The *information* was a blanket charge covering all possible offenses included in the language of the statute, and neither in the first count nor in any other, named any organization (pages 14-16).

The inquiry then is: was the lack subsequently supplied? The *demurrer* to the information was overruled (pages 17-18, 65-6).

Miss Whitney *moved for a bill of particulars*. The motion papers show her and her counsel's complete uncertainty on January 13, 1920—two weeks before the trial began (see page 69)—what the occasion was upon which the prosecution was based. The date named in the information was "on or about the 28th day of November" (page 15). The District Attorney on the previous argument of the motion for a demurrer had, according to the repeated and undenied allegations of Miss Whitney's attorney, declared that the prosecution was "connected with the occurrence of November 28th and 'centering around that date'" (page 63)—which was the date of her arrest (page 62). The meeting Miss Whitney attended on that day was a meeting of the Civic League of Oakland which she addressed on the negro problem (page 62). The question is of course, not of the date alone; the point is that neither by an accurate date nor by the name of a specified organization was the occasion charged in any way identified (see the motion papers, pages 61-64; see for a good statement of the theory of many objections, 305-6). The motion for a bill of particulars was denied (pages 17-18), and Miss Whitney was compelled to go to trial without the sort of information Hodgson had from the beginning.

The defects we have thus far noticed are defects which in substance the highest court of the State of California, passing upon a prosecution under the same section, has admitted. The prosecution in *People vs. Taylor* (187 Cal., 378) was

directed against one whose complete identification with the Communist Labor Party—the national organization as well as the California state organization—and whose personal activity in furtherance of its policies were abundantly shown by the record. Taylor, too, was convicted under section 2, subdivision 4 of the Criminal Syndicalism Law. But even in his case, the California Supreme Court found the count drawn “in the exact language of the statute” (page 397) “clearly insufficient”* (page 398).

*The California Court affirmed the conviction as to that count because Taylor “upon the *voir dire* of the jury, asked the District Attorney to specifically state what organization or party was referred to in the indictment for which it was intended to prosecute him. The District Attorney replied ‘Communist Labor Party’ so that during the actual trial of the case there was no doubt in the mind of the defendant as to the organization with which he was charged with affiliating” (page 382). Taylor’s brief showed plainly—the Court goes on to explain—that he knew that the accusation was based on “his prominent part in the organization of the Communist Labor Party of California.” “In the absence of some indication in the record or some claim on appeal that the defendant was surprised by the method in which the charge against him was made and proven, we cannot see that the defendant was prejudiced by the failure to mention the name of the organization to which it is charged he belonged” (187 Cal., page 382).

The District Court of Appeal in the *Whitney* case (page 3), cites the *Taylor* case and declares the “two cases” to be “identical.” Judge Richards added that “in each case, the defendant was fully advised upon the *voir dire* examination of the jurors and in the opening statement of the District Attorney” concerning the identity of the organization. In spite of the inaccurate use of “each,” the obvious meaning is that in the *Taylor* case this information was given upon the *voir dire* and in the *Whitney* case upon the opening; the opinion in the *Taylor* case makes no reference to the opening; on the other hand this record shows no reference to any organization in the *voir dire* (pages 19-22). (As to the district attorney’s opening in this case, see pages 9-10 *supra*, and page 32 *infra*.)

See also

State vs. Laundry, 103 Ore., 443, cited
infra, page 34, footnote.

It is thus clear that Miss Whitney was not accorded the right to which, under the *Hodgson* opinion, as we read it, she was entitled—the right to go to court “*prepared*.” No less manifest is it that the lack was never supplied in the course of the trial and that the original uncertainty persisted and was indeed intensified.

The District Attorney’s *opening*, as the statement of facts (pages 9-10, *supra*) has shown, mentioned various groups and bodies, the Chicago Convention (page 70), the Oakland Local (page 71), the I. W. W. (page 72). It did not even name the Communist Labor Party of California. It did not specify the convention of November 9, 1919, as the occasion of the offense for which Miss Whitney was to be prosecuted under the first count. So utterly inadequate was the opening indeed that the District Court of Appeal, as we have seen, conceived it as directed to establishing a guilty connection with the Oakland Local (*supra*, pages 19-22).

Miss Whitney’s counsel *moved for the direction of a verdict* after the opening and pointed out the vagueness of the accusation as a basis for his application (pages 72-3); the motion was denied, as was also a general objection to the admission of evidence “on the ground that the information does not state any public offense” (pages 73, 20).

To the ruling thus made, the trial judge steadily adhered. Miss Whitney’s counsel for example

objected to the admission of evidence relating to the I. W. W. on the ground that "We don't know what this lady is being tried for. Is she being tried for being a member of the I. W. W., aiding, abetting or assisting them; or being a member of the Communist Labor Party, and aiding, abetting and assisting them?" (page 283, see also pages 291, 298). The District Attorney distinctly argued that "her relationship with the I. W. W. organization" (page 283) was itself at issue. He contended for the admissibility of the evidence as a circumstance "to bring her home in connection with the I. W. W." (see page 282, see also 283). "She agreed to do certain things for the I. W. W. organization," the District Attorney said (page 280); "we are going to follow it up by showing there was a meeting then" (page 280).

The court declared merely that "we have the Communist Labor Party here on trial *rather than* the I. W. W. organization" (page 288) and received the evidence. "It would be proper" the court ruled a little later "to show what the action of any of the locals or branches of the I. W. W. was and what they did in their meetings" (page 292).

At the end of the state's case, counsel for plaintiff-in-error again attempted to secure a ruling which would make it clear "what this jury is trying" under the first count of the indictment (page 307). He said that from the conduct of the case he assumed that Miss Whitney was charged with having become a member of the Communist Labor Party of California at the state convention on November 9, 1919, and that the evidence concerning I. W. W. outrages was admitted to show

the character of the organization which the Communist Labor Party of America had in some sense endorsed or at least "recognized" (page 176), and which the Communist Labor Party of California in adopting the national platform and program (in place of the resolution which had Miss Whitney's sanction and which she herself read to the convention) had therefore endorsed at second hand. He then asked that the prosecution, if it did not accept this theory, be required to *elect and state* the offense which it did desire to submit to the jury under this count (see pages 305, 307). The prosecution ironically declined to adopt this theory of its case* and the Court declined to require the prosecution to make the election or to define the issue for the jury** (page 307, see for a similar attempt by the defense and its failure, pages 133-4, 137).

Defendant requested the *direction of a verdict* on "each and every count" after the evidence was in, including the ground of "variance between

*"Mr. Calkins: It is always illuminating to get somebody else's understanding of the theory—I don't feel that there is anything which now compels me to analyze your version of my theory" (page 305).

**In *State vs. Laundry* (103 Ore., 443), the Supreme Court of Oregon reversed a conviction under the Oregon Criminal Syndicalism Law. The indictment, which followed the language of the statute (corresponding to Section 2 [4] of the California statute) charged organizing, membership and assembling, all in one count. The organization (the I. W. W.) was named. Refusal at the end of the trial to require the prosecution to elect whether it would go to the jury on a charge of *membership* in the I. W. W. or on a charge of *assembling* with the I. W. W. (there was no evidence to support the charge of organizing) was held reversible error.

information and proof" (page 31); the request was refused.

The court supplied the jury with "*forms of verdict*" (pages 47-8). The jury struggled to bring their verdict within some one of these forms (page 49). The forms were wholly general (pages 47-48) and so was the verdict (pages 28, 30)—"guilty of felony as to counts One and not guilty as to counts" (pages 28, 30).

The *affirmance* by the California District Court of Appeal shrouded the result in additional uncertainty (pages 3-4). It remains today an enigma what Miss Whitney was charged with and of what she was convicted.

The result does not amount merely to a misapplication of the state's recognized forms of criminal procedure. It goes far deeper. The California courts' application of the Criminal Syndicalism Act to Miss Whitney's case deprived her of the fundamental requirement of due process—notice of the accusation against her. The test of constitutionality cannot, of course, be narrowed to the mere wording of a state statute. If such were the rule, state courts would be free to indulge in the most unconstitutional practices under cover of an unobjectionably worded statute (compare *Scott vs. McNeil*, 154 U. S., 34).

See also

Roller vs. Holly, 176 U. S., 398;

Londoner vs. Denver, 210 U. S., 373, 385.

"inquiry is not precluded or ended by the mere fact that the judgment complained of

was reached by proceedings in a state Court in pursuance of the provisions of a state statute" (*Hodgson vs. Vermont*, *supra*, 168 U. S., at page 273).

* * * * * *

The failure throughout the trial ever to designate either the particular offense—the statute covered organizing, membership and assembly—or the particular occasion of the offense, is the basis of another and related contention. One of the reasons why an indictment or information must contain particulars, or those particulars must subsequently be supplied is, of course, to protect the defendant against double jeopardy. It is "fundamental in the law of criminal procedure," that the accused must be apprised with reasonable certainty of the nature of the accusation against him, both that he may prepare his defence, and that he may "*plead the judgment as a bar to any subsequent prosecution for the same offense*." An indictment not so framed is defective, although it may follow the language of the statute" (*U. S. vs. Simmons*, 96 U. S., 360, 362, *our italics*).

See also

U. S. vs. Cruikshank, 92 U. S., 542, 558;
Cochran vs. U. S., 157 U. S., 286, 290.

Miss Whitney's counsel was absolutely correct in arguing in support of his motion that if "this Court brings in a verdict of 'Not Guilty' in this case on this Information * * * it will not prevent

the District Attorney from starting a new action about the 9th and bringing in the very same facts he is bringing in this case" (page 73).

This Court has thus far found it unnecessary to decide whether a subjection to double jeopardy would *by itself* be a denial of due process within the meaning of the Fourteenth Amendment (*Keerl vs. Montana*, 213 U. S., 135). In this case the double jeopardy point does not stand alone. It is but the necessary consequence of the denial of proper notice which this Court has recognized as a fundamental right,—a right which it is the "duty" of this Court to protect against infringement by the states (*Hodgson vs. Vermont*, *supra*).

POINT II.

The Court's consistent refusal to particularize the issue permitted the jury to predicate guilt of meetings and assemblages that were outside Alameda County and that took place either before the passage of the Criminal Syndicalism Law or after the date named in the information. The general verdict could, as far as appears, have been based upon any one of these occasions, every one of which should have been peremptorily excluded from the jury's consideration as a basis of conviction. That confusion of issues which the rule of *Hodgson vs. Vermont* (168 U. S., 262) is designed to prevent, appears in *Miss Whitney's* case in its most prejudicial form.

We have seen that as the case was in fact submitted to the jury, it is the merest speculation what connection of *Miss Whitney's* they found to be the guilty one, whether with the Oakland Local or the Communist Labor Party of California or the Communist Labor Party of the United States or the State Executive Committee or the I. W. W., and what the nature of that connection was—whether organization, membership or assemblage.

In this point we shall demonstrate how grievously damaging the confusion of issues was. In succeeding points we shall argue that for a variety of constitutional reasons, conviction cannot be based upon the Oakland convention. We shall here show that *not one* of the other incidents, which the Court without discrimination submitted to the jury constituted assembly, organi-

zation or membership in Alameda County between the passage of the Syndicalism Law on April 30, 1919 and November 28, 1919, the date named in the information, or indeed up to the date of the trial.

(1) Manifestly the references to the I. W. W. should have been definitely excluded from the jury's consideration as substantive bases of conviction. There was absolutely no evidence that Miss Whitney **ever** belonged to the organization or had anything **to do** with it. The admitted "informer" (page 228)—once an I. W. W. Secretary (page 224)—whom the prosecution called, "knew that this lady never held a card in **the organization**" (page 231; see also page 232). **Her only** contact with individual members—casual **meetings in** connection with legal defense—were in **July and August, 1918** (pages 274, 282)—while the Criminal Syndicalism Law, as the information shows, was passed only in 1919 (page 15). Nevertheless, scores of pages of the testimony were taken up with the proceedings and acts of the I. W. W. (see, for example, pages 220-228). This evidence was largely related to a particular convention in Chicago in 1916 (page 225)—three years before the Syndicalism Law was passed; there was proof too (pages 255-260) concerning a meeting in Sacramento more than five years before the enactment (page 255). The most striking evidence that went before the jury was the evidence of particular acts of incendiarism and cattle poisoning by members of the I. W. W. (pages 258-266, 269-271), and, as we have seen, the District Attorney himself avowed his intention to directly connect defendant

with the I. W. W. (page 282; see also page 280). "It is a circumstance to bring home to her her relationship with the I. W. W. organization" (page 283; see also for the District Attorney's opening, pages 70-72).

(2) The Chicago Convention of the National Communist Labor Party also should have been definitely excluded from the jury's consideration as a basis of guilt both because Miss Whitney never attended the convention and because it was held outside Alameda County and outside the State of California.

(3) Despite the belief of the District Court of Appeal that her connection with the Oakland Local was the guilty one, there is in fact no evidence in the record that she ever organized, helped to organize or assembled with that body; the record shows merely that at some time—whether before or after the passage of the act on April 30, 1919, is left uncertain—she had become a member of it (page 118) while it was a Socialist body (pages 119, 189). The record shows absolutely no connection with the body after the Communist Labor Party of California was formed. It was affirmatively proved that Miss Whitney attended no meeting of this Local after that date (pages 189, 192). Her physical presence on three occasions—two of them after the date named in the indictment—at Loring Hall when members of Local Oakland were "coming and going" and no meeting was in progress (page 206)—is not claimed to constitute assembly.

Finally, not a single resolution, proceeding, platform or program of Local Oakland was received or offered in evidence, and as its character was thus left undefined, there is no basis for a finding that association with it could be punishable. We know that the proceedings at the State convention were *not* reported to Local Oakland (page 157) or ratified by it (page 190), and that it *never* had a charter as a Local in the Communist Labor Party of California (page 156) and therefore was no part of the national body either (pages 153, 154; 184). "It was independent of every other organization" (page 156). It had not put in an application for a charter (page 156).

Summarizing and re-stating the foregoing, we find the case with respect to the Oakland Local to be this: There is not one item of evidence when Miss Whitney became a member of the body—whether before or after the Criminal Syndicalism Law was passed,—though it is proved affirmatively and without contradiction that it was definitely a Socialist and in no possible sense a Communist Labor Organization at the time; there is no shred of evidence that she ever organized or helped to organize the body or when or how or by whom it was organized; there is no shred of evidence that she ever attended a meeting of the body either before the Criminal Syndicalism Law was passed or after, and there is affirmative and undisputed proof that she did not attend any such meeting after the Communist Labor Party of California was founded; there is no proof of any declaration by the Local,—the only evidence as to its character is that it was a Socialist body in the beginning and remained "independent" to the end.

(4) Miss Whitney's attendances as alternate at two meetings of the Executive Committee of the State Party (*supra*, pages 13-14)—one in San Jose, one in San Francisco—should again have been explicitly excluded from the jury's consideration for all of the following reasons: because both of these meetings were after the date named in the information; because both of them were outside of Alameda County—one being in Santa Clara County, the other in San Francisco County,—and finally because there is absolutely no proof what Miss Whitney or any other person said or did at either of the meetings, or that she or any one did anything.

The Judge's charge never informed the jury whether it was the Communist Labor Party or the I. W. W. whose character was at issue; on the contrary, he treated them together and, adopting a charge of the prosecution (pages 36-7), mentioned the I. W. W. first (page 46). He told the jury—again in the language of the prosecution (page 37)—that it was for them “to determine the character of the organization of which it is claimed the defendant is a member” (page 46), but, as we have seen, he did not tell them what that organization was.

Under the doctrine of *Hodgson vs. Vermont* there would have been a denial of constitutional rights had the confusion been between accusations all of them in themselves valid; the fact that there *was* confusion would have deprived the defendant of her right to go to court “prepared.” But Miss Whitney's case went to the jury without the elimination of all these occasions which

had been emphasized in the evidence, every one of which as a matter of law should have been strictly excluded from the jury's consideration as a substantive basis of guilt. Guilt may in fact have been found by the jury by reason of one or several of these very issues. On the prosecution of Rose Pastor Stokes for violating the Espionage Act a "false issue" (264 Fed. at page 21) was submitted along with an incident of which guilt could properly be predicated. The Circuit Court of Appeals remarked (citing *Maryland vs. Baldwin*, 112 U. S., 490) that "the generality of the verdict renders it impossible to determine upon which theory the jury based it" (*Stokes vs. U. S.*, 264 Fed., 18, 23), and proceeded to reverse the conviction.

Much in point upon the practical situation Miss Whitney's case presents, is the decision of Sanborn, C. J., in *Fontana vs. U. S.* (262 Fed., 283). Fontana was indicted under the Espionage Act. In that case, as in this case, the indictment set forth the accusation in the most general language only (262 Fed. at pages 286, 287). In that case, too, every incident, except one, was an incident whose consideration as a substantive basis of conviction should have been definitely excluded: "All of the evidence recited, except that with reference to the sermon in August, relates to expressions used prior to June 15, 1917 [when the Espionage Act was passed] for the use of which he could not be convicted if they had been charged" (262 Fed. at page 290). With respect to the generality of the accusation, Judge Sanborn thus expressed himself:

“If the pleader had set forth in this indictment any fact or facts, such as the time, place, occasion, circumstances, persons present, or any other distinctive earmark whereby the defendant could have found out or identified the occasion or occasions when the government intended to attempt to prove that the defendant uttered any of the nine sayings charged he might have been able to investigate the basis of the charges to learn who were or were not present on the occasions referred to, hence who were possible witnesses, and to prepare his defense; but there is nothing of that kind in the indictment. As it reads, he might have been called to meet on each of the nine charges testimony that at any time of day or night, at any place in New Salem, on any occasion, public or private, before the indictment was filed, and after the Espionage Act was passed on June 15, 1917, he had uttered to any one whomsoever any of the statements charged in the indictment. These considerations compel the conclusion that this pleading signally failed to state the facts which the government claimed constituted the alleged offense in this case, so distinctly as to give the defendant a fair opportunity to prepare his defense to meet any of them, and that he could not and did not have that notice of them required to give him a fair trial” (286-7).

The Circuit Court of Appeals of course reversed the conviction.

That Miss Whitney's trial was not "a fair trial" cases like *Stokes vs. U. S.* and *Fontana vs. U. S.* clearly establish; that the right denied was a right around which the Fourteenth Amendment throws the protection of the Constitution of the United States, *Hodgson vs. Vermont*, makes wholly clear.

The actual injury the denial of that right worked in Miss Whitney's case, the present record from beginning to end illustrates. Nothing illustrates this more clearly indeed than the jury's verdict, general though that verdict was. What specific occasion induced it, we do not and cannot know. One great fact, however, stands out: the comparatively concrete accusations which the second, third, fourth and fifth counts embody—accusations of advocacy by "speech" and "writing" and "personal acts"—all failed. It was upon the count that from beginning to end of the case remained an enigma—upon the count that at the end of the case was a greater enigma than at the beginning—that conviction was had.*

*Certain incidents of the trial increased the burden under which the defense labored. The trial was begun (page 70) within a month after the information was filed (page 14). The influenza epidemic was raging at the time: there was serious illness in the family of Miss Whitney's trial counsel, Mr. O'Connor, at the opening of the case, but his request for a continuance was denied (page 69). By the second day of the trial (pages 20, 117) Mr. O'Connor himself was ill (page 134). By the third day (pages 21, 137, 144) he was a **very sick man**, though still in court (page 145). His illness seriously interfered with the cross examination of the prosecution's witnesses (page 145), as the Court indeed noted (page 149). At the next session, February 2 (pages 21, 195), Mr. O'Connor was unable to be present (pages 198, 200), and a two days' continuance was granted. On Wednesday, February 4 (page 200), further adjournment was refused, although Mr. O'Connor's associate, Mr.

(Footnote continued on next page.)

* * * * *

In succeeding points we shall see that not only should every incident except the convention of November 9, 1919 have been withdrawn from the jury's consideration as a substantive basis for a finding of guilt but that for many constitutional reasons no conviction based upon that incident can stand, and that the result, even apart from the doctrine of *Hodgson vs. Vermont*, was a plain denial of due process of law. In this case it will thereby appear *every* issue was a "false issue."

Pemberton, declared that it would be "dangerous to Mr. O'Connor to be unable to tell him that the case is postponed" (page 201). Mr. Pemberton, who had previously been threatened with punishment for contempt by the Court (page 131), objected to assuming the burden of the defense, and Miss Whitney announced that she did not wish Mr. Pemberton to act as her trial counsel (page 199; see also pages 202-203). The Court, however, refused to allow Mr. Pemberton to withdraw, and required him to go on with the trial after a recess of a few moments (page 204). On Monday, February 9 (page 212), the death of Mr. O'Connor was announced in court and after one day's adjournment, on February 10 (page 213), Mr. Coghlan was substituted as trial counsel for Miss Whitney, and the trial continued (page 214). Miss Whitney herself was ill for a time during the trial (pages 196-8; 200) and one of the jurors died (page 212) and was replaced by the alternate juror.

POINT III.

If the conviction was based on defendant's participation in the Oakland convention of November 9, 1919 she was punished not for her own acts but for the subsequent acts of other persons. This, within the decision of this Court in *U. S. vs. Fox*, 95 U. S., 670, constitutes a denial of due process.

Our discussion has now been narrowed to the convention of November 9, 1919. The facts are in no dispute.

Until November 9, 1919, the Communist Labor Party of California was in process of preliminary organization (pages 82; 153-4). On that day its convention was held. There was naturally—and indeed necessarily—the organization being still temporary and tentative, a continuing uncertainty at least until that day what character the majority of the convention would give to the party. This uncertainty lasted until the precise moment when Miss Whitney's resolution for political action was voted down by the majority in its final session (compare as to the precise time, pages 117; 121; 140; 308-9).

Miss Whitney's committee introduced and she signed and approved a resolution which "fully recognized the value of political action" (pages 101-2; 123). Had that resolution been adopted the Communist Labor Party would have taken an unequivocal stand in support of "changes in our Government by the ballot, by political method" (compare the opening of the District Attorney, page 70; see also statement of Mr. Harris, page 122), and could not by any possibility have

fallen within the prohibition of a statute leveled against acts of "crime," "sabotage" or "unlawful methods of terrorism." The effort of Miss Whitney and her associates failed (pages 121; 142-3) and the majority of the convention committed themselves to a purpose that the California courts have condemned.

The case was thereafter submitted to the jury upon the theory that Miss Whitney's personal purposes and intents were immaterial and that permitted the jury to find her guilty merely by reason of her presence. The trial court disposed of the question of intent by quoting the general declaration that "all persons are of sound mind who are neither idiots nor lunatics nor affected with insanity" and that it is a "presumption of law that an unlawful act is done with an unlawful intent" (page 40). By charging "that the law presumes that every man intends the natural consequences of his acts knowingly and deliberately committed" the court did away with any requirement of personal intent or—as in the law of crimes it is often called—"specific intent" on Miss Whitney's part. This theory the appellate court fully adopted. "That this defendant did not realize that she was giving herself over to forms and expressions of disloyalty," the California District Court of Appeal declared, "is a matter with which this court can have no concern, since it is one of the conclusive presumptions of our law that a guilty intent is presumed from the deliberate commission of an unlawful act" (page 4).

As Miss Whitney's connection with the convention of November 9, 1919, was not only admittedly innocent but, judged by the District Attorney's

own standards (page 70; see also 122), proper and even laudable, this theory of prosecution was the very crux of the case, and the constitutional question that it raises goes to the foundation.

That question is: Can one be constitutionally convicted of felony and subjected to imprisonment* for joining a body which at the time he joins has no character and which is subsequently, by the action of others, taken over his protest, given an objectionable character?

Stated more generally, the question is: Can an act, innocent at the time, constitutionally become a crime by reason of the subsequent action of other persons? To that question the case of *U. S. vs. Fox* (95 U. S., 670), supplies the answer. The statute there considered provided

“that ‘every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or that of a creditor,’ who, within three months before their commencement, ‘under the false color and pretense of carrying on business, and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud,’ shall be punished by imprisonment for a period not exceeding three years.”

The statute, in other words, made guilt or innocence of the offence of obtaining goods on credit “under false color and pretense” dependent upon

*The statute leaves no alternative to a prison sentence of from one to fourteen years (Appendix A).

the subsequent action either of the defendant himself or of other persons in filing voluntary or involuntary bankruptcy proceedings. This Court condemned the statute as unconstitutional—partly as an unwarrantable intrusion by the federal government into the ordinary criminal law of the states—but in the first instance “upon principle.” Mr. Justice Field began his opinion with the following statement (page 671):

“The question presented by the certificate of division [of the court below] does not appear to us difficult of solution. Upon principle, an act which is not an offence at the time it is committed cannot become such by any subsequent independent act of the party with which it has no connection. By the clause in question, the obtaining of goods on credit upon false pretenses is made an offence against the United States, upon the happening of a subsequent event, not perhaps in the contemplation of the party, *and which may be brought about, against his will, by the agency of another. The criminal intent essential to the commission of a public offence must exist when the act complained of is done: it cannot be imputed to a party from a subsequent independent transaction.*” (Our italics.)

The case at bar is a much clearer case than the *Fox* case: Miss Whitney’s act in joining a still temporary and tentative body was a colorless act; Fox obtained credit “under false color and pretense.” The “subsequent event” which brought

Fox's act within the prohibition of the statute was an act of his own,—“the defendant filed a petition in bankruptcy” (95 U. S. at page 670); the subsequent event in Miss Whitney's case was the action of others who rejected her resolution and adopted contrary policies.

POINT IV.

The crime of membership, organization or assemblage defined by the California Criminal Syndicalism Law has been recognized by the Supreme Court of California as a crime of conspiracy. To conspiracy a specific intent to participate in the purposes of the combination is an essential. The trial Court submitted the case to the jury and the District Court of Appeal sustained the conviction upon the theory that that intent could be conclusively presumed from the mere fact of presence. The application of that presumption to the case is, within the doctrine of *McFarland vs. American Sugar Co.*, 241 U. S., 79, a denial of due process.

The nature of the crime defined by Section 2, subdivision 4, of the Criminal Syndicalism Law of California is not in doubt. In the leading case of *People vs. Steelik* (187 Cal., 361) Wilbur, P. J., reviewing the whole statute, said (pages 368-9):

“It seems clear that not more than three crimes are described in the statute: First, the commission of a crime for the purpose of effecting the desired change; second, advocating the commission of such a crime, although it might not have occurred, and where the advocates would not therefore be accomplices in the crime; this would include those who print or write documents in furtherance of such crime; and third, *forming a criminal conspiracy for the purpose of committing such a crime.*”

• • • • •

"The conspiracy denounced in subdivision 4, section 2, is also a separate and distinct crime, which may result in the commission of the crime advocated, in which event the conspirators can be charged as principals in the crime."

* * * * *

"There was thus evidence before the jury that the defendant had violated section 2, subdivision 4, of the statute, that is, he knowingly belonged to a conspiracy to commit crimes, in furtherance of industrial and political control." (Our italics.)

Precisely as the defendant in a larceny case must intend to deprive another in some way or other of property or the defendant in a malicious mischief case must actually intend to do harm, so a conspirator must have a "corrupt intent." The late decision of the Circuit Court of Appeals for the Sixth Circuit in *Landen vs. U. S.* (299 Fed., 75) well states the familiar principle and gives to that principle a striking illustration. The prosecution was for conspiracy to violate the National Prohibition Act by selling intoxicating liquor without the necessary permit. The evidence disclosed that defendants in good faith believed that no permit was in their case necessary. The Court recognized that even as to *mala prohibita* a conspiracy conviction must rest upon a showing of conscious intent to do a forbidden thing. At pages 78-79, Denison, C. J., thus rationalizes the subject:

"It is settled that with regard to criminal prosecutions for those acts which are not

mala in se, but which through legislative exercise of the police power have become mala prohibita, no conscious intent to break any law is essential. The respondent need not even know that the law exists. *Shevlin vs. Minnesota*, 218 U. S., 57, 68; *U. S. vs. Balint*, 258 U. S., 250, 252; *Armour vs. U. S.*, 209 U. S., 56, 85, 86. When, however, the prosecution is for conspiracy, the text-books and elementary discussions seem to agree that there must be a 'corrupt intent,' which is interpreted to be the mens rea, the conscious and intentional purpose to break the law. Bishop's Criminal Law (8th Ed.), §§297, 300; 12 C. J., page 552, §16; 5 R. C. L., page 1066, §6. The principle that even a mistake of law may protect one accused of crime has familiar illustration in the rule that, if the respondent in a prosecution for larceny took the property in a good-faith, though erroneous, belief that he had the legal right to its possession, he is not guilty."

Judge Denison goes on to note that

"the principle was applied to conspiracy in *People vs. Powell*, 63 N. Y., 88, 91, 92. In a careful opinion by Judge Andrews, the difference between the intent involved in the substantive offense, which intent the law will imply from the act, and the 'corrupt intent' necessary to make conspiracy, which intent does not necessarily follow from a plan to do the act, is clearly pointed out. The case has stood for 50 years

as the leading one on the subject, and if it be confined, as it is (page 92), to a plan to do an act 'innocent in itself,' it has never, so far as we find, been questioned." (Our italics.)

The doctrine which Judge Denison so recently expounded and applied is a doctrine which derives from the basic principle Shaw, C. J., thus stated in *Commonwealth vs. Hunt* (4 Metc., 111)—an early and leading case on conspiracy: "The unlawful agreement constitutes the gist of the offense" (page 125). It follows (as the great Chief Justice of the Massachusetts went on to say) that

"when an association is formed for purposes actually innocent, and afterwards its powers are abused, by those who have the control and management of it, to purposes of oppression and injustice, it will be criminal in those who thus misuse it, or give consent thereto, *but not in the other members of the association*" (page 129; our italics.)*

*The principle of the conspiracy cases has regularly been applied to crimes in the nature of seditious assembly (*Redford vs. Burley*, 3 Starkie, N. P., 76, 102, 107, 110-128; *Duane's case*, Wharton American State Trials, 345, 386, 388; 2 Stephen, History of the Criminal Law of England, 386; see also as to treasonous assembly the case of *Green vs. Bedell*, stated and approved in *Rex vs. Huggins*, 2 Ld. Raymond, 1574, 1585).

In no case before the present, as far as we have been able to discover, that has been submitted to any court, has the attempt been made to impose any legal consequences, civil or criminal, by reason of membership in an organization or attendance at a meeting in the face of affirmative proof of dissent from questionable practices. A somewhat similar question was, however, presented to the Labor Department of the United States under the act of October 16, 1918 (40 Stat., 1012,

(Footnote continued on next page.)

How then did the California courts deal with this basic requirement of the crime for which

Chap. 186), providing for the deportation of aliens "who are members of or affiliated with any organization that entertains a belief in, teaches or advocates the overthrow by force or violence of the government of the United States." The Department ruled that membership in the Communist Party—though not in the Communist Labor Party—was, in general, ground for deportation (see *infra*, page 77, footnote). Deportation was not, however, permitted where the evidence showed the alien's personal ignorance of the Communist Party's purposes. The leading case is *In re Truss* (Decision of the Labor Department reported in "Hearings before a sub-committee of the Committee on Immigration and Naturalization, House of Representatives, 66th Congress, 2nd Session," April 21-24, 1920—Government Printing Office, Washington, pages 14-18). The Department recognized the problem with which the statute dealt as a problem of conspiracy,—“to permit aliens to violate the hospitality of this country by *conspiring* against it is something which no American contemplates with patience” (17). The following extracts show the basis for its ruling that innocent membership in a guilty organization was not a basis for deportation:

“In some cases the membership is ‘automatic,’ the arrested alien having been transferred from a lawful organization to the unlawful one by vote of a group or branch of the former and without his knowledge. In some cases he has had knowledge of the transfer but none at all of the character of the organization to which he has been transferred. In other cases he has signed applications before the existence of the unlawful organization and has never confirmed his membership by any conscious act. Sometimes an organizer or a friend has signed the application for him” (16-17).

* * * * *

“The Congress of the United States should not hastily be presumed to have intended that resident aliens be arrested and deported as members of an unlawful organization, when all the circumstances show the alien himself to have been innocent of any guilty knowledge of [or] malice in taking membership and when it appears not only that he is and has been wholly free from any hostile purpose toward this Government, but that he is sympathetic with our democratic institutions” (page 16).

Miss Whitney was convicted? The trial judge took out from the charge, as the defendant submitted it (page 33), the requirement of the "*criminal* intent of doing an act forbidden by the law" (see page 40); he thus took out of the definition of the crime that "conscious and intentional purpose to break the law" which in a conspiracy there "must be" (*Landen vs. U. S., supra*); at the same time he ruled that the "malicious and guilty intent," might be made out by presumption, by "presumption of law" (page 40). While he perhaps indicated that the presumption was rebuttable he denied all practical effect to the possibility of rebutting it by giving as his illustration of persons outside the presumption only "idiots" and "lunatics" (page 40). The California District Court of Appeal definitely declared the presumption an absolute one; Judge Richards said that with Miss Whitney's personal opinions and attitudes, with the question what she did or did not "realize," "this Court can have no concern, since it is one of the *conclusive presumptions* of our law that a guilty intent is presumed from the deliberate commission of an unlawful act" (page 4).

It was by this presumption that the trial court laid the foundation for Miss Whitney's conviction on a charge that the Supreme Court of the state had recognized and authoritatively defined as a "charge of conspiracy" (*People vs. Steelik*, 187 Cal., 361, 368-9); and it was by virtue of what it declared to be a "conclusive presumption" of "law" that the District Court of Appeal affirmed that conviction.

A conviction of conspiracy so founded is a denial of due process. The result would indeed be constitutionally forbidden were the presumption merely *prima facie* and actually rebuttable. So this Court has definitely held. The Louisiana statute considered in *McFarland vs. American Sugar Co.* (241 U. S., 79), provided that

“ ‘any person engaged in the business of refining sugar within this State who shall systematically pay in Louisiana a less price for sugar than he pays in any other State shall be *prima facie* presumed to be a party to a monopoly or combination or conspiracy in restraint of trade and commerce, and upon conviction thereof shall be subject to a fine of five hundred dollars a day for the period during which he is adjudged to have done so’ ” (page 81).

This Court in holding the statute unconstitutional said (page 86):

“As to the presumptions, of course, the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is ‘essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.’ *Mobile, Jackson & Kansas City R. R. vs. Turnipseed*, 219 U. S., 35, 43. The presumption created here has no relation in experience to general facts.”

And again (*ibid.*):

"It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."

Clear as is the decided case, the case at bar is clearer yet. The "rebuttable presumption" (see headnote 241 U. S., at page 79 and compare page 81) considered in the *McFarland* case had "no relation in experience to general facts"; the all but irrebutable presumption which supplied the basis for Miss Whitney's conviction and the "conclusive presumption" whereby that conviction was sustained were in direct *opposition* to the proved and undisputed facts,—the facts namely that Miss Whitney far from concurring in the questionable policies which the convention of November 9, 1919, finally adopted, fought those policies but was outvoted and overruled by the majority.

The precise error into which both the California courts fell and its effect may be thus restated. Relying on certain presumptions of fact*

*Sections 1962 and 1963 of the California Civil Code list certain presumptions as "conclusive" and others as "disputable." Section 1962 (Subd. 1) provides that the presumption of "a malicious and guilty intent from the deliberate commission of an unlawful act for the purpose of injuring another" shall be "conclusive." The trial court paraphrased this statutory statement in its charge (page 40); the District Court of Appeal likewise paraphrased it, cited the section, and expressly declared the presumption "conclusive" (page 4). The trial court further relied (page 40) on the presumption which Section 1963 lays down "that an unlawful act was done with an unlawful intent" (Record, page 40).

codified by the California Civil Code, these courts accepted as applicable to *all* the offenses defined by the California Syndicalism Law the conclusive presumption of unlawful intent that ordinarily flows from the doing of an unlawful act. This presumption is inapplicable to the *only* count upon which Miss Whitney was convicted, the count in the nature of conspiracy. In thus applying it the courts overlooked the "difference between the intent involved in the substantive offense, which intent the law would imply from the act, and the 'corrupt intent necessary to make conspiracy' " (*Landen vs. U. S.*, *supra*). The result was a denial of due process. The conviction under the California Syndicalism Law, as construed and applied in this case is as plainly a violation of the Fourteenth Amendment as if that statute said in so many words that guilt of conspiracy could be presumed from mere presence in an assemblage and without proof of concurrence.

"It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment."

Bailey vs. Alabama, 219 U. S., 219, 239.

See also

Truax vs. Corrigan, 257 U. S., 312, 324, collecting cases.

POINT V.

The statute provides no definite test of criminality. Defendant could not know at the time of joining an organization still in its formative stage whether the action of other persons would or would not give it a character which the statute might condemn. Because the statute thus in effect calls for "prophetic" quality, it works a denial of due process under the doctrine of *International Harvester Co. vs. Kentucky*, 234 U. S., 216.

The California courts in this case refused to apply any test of Miss Whitney's personal intentions and attitudes to the problem of her guilt. By so doing they made her guilt dependent not upon the intention which accompanied her own act in joining an organization still in process of formation and not upon the quality of any of her own acts in connection with the organization, but upon the character which other persons after her joining gave to the organization. The standard of conduct which the statute as construed and applied imposed upon Miss Whitney was a standard too vague to be a constitutional basis for criminal prosecution.

In its application to many conceivable states of fact, where the purposes of the organization or assemblage were fixed or where the defendant's own share in the activity of the organization or in the acts of the assemblage are such as to clearly come within the definition of criminal syndicalism—as was true in the cases which the California Supreme Court reviewed and affirmed (*People vs.*

Steelik, 187 Cal., 361; *People vs. Taylor*, 187 Cal., 378)—no practical difficulty with this statute on the ground of uncertainty need arise. But the case of the plaintiff-in-error is not such a case. The lack of definiteness of which she complains is the impossibility of applying the statute with any reasonable degree of certainty to the problem of her own conduct.

“Laws which create crime ought be so explicit that all men subject to their penalties may know what acts it is their duty to avoid.”

U. S. vs. Brewer, 139 U. S., 278, page 288.

“No penal law can be sustained unless its mandates are so clearly expressed that an ordinary person can determine in advance what he may and what he may not do under it.”

Chicago & N. W. Rwy. Co. vs. Dey, 35 Fed., 866, page 876—*Brewer, J.*

See also

U. S. vs. Cohen Grocery Co., 255 U. S., 81;

U. S. vs. Reese, 92 U. S., 214, 219.

What then was the standard of conduct which this statute exacted of plaintiff-in-error, and wherein did she deviate from this standard?

She was a member of Local Oakland, which was a branch of the Socialist organization. She voted for the delegates which Local Oakland sent to the convention of the Socialist Party held in Chicago on August 30 and September 1, 1919. She did not attend that convention and therefore had no part in the formation of the Communist Labor Party of the United States of America which resulted from that convention. She was named as a delegate of Local Oakland to a convention to organize a State branch of the Communist Labor Party and attended that convention. The sentiments and purpose of the state organization still remained to be determined, and the character of the resulting organization could not be foretold. The convention was an open one, no violation of law being intended or foreseen (pages 112, 335). Defendant in attending had no purpose of helping to create an instrument of terrorism and it was not her purpose, nor, as far as she knew or could know, the purpose of the convention—if an inchoate organization of this character could be said to have anything so unified as a purpose—to do anything unlawful (pages 309, 335). She took part in formulating and presenting to the convention a resolution which, if adopted, would have committed the new organization to a legitimate policy of political reform by the use of the ballot. As things turned out, the majority of the meeting were contrary-minded, and other less temperate policies prevailed. The record shows no further act done by the plaintiff-in-error within the district in which she was prosecuted. At what point did this course of conduct, which was admittedly

innocent in the beginning, become a crime, and how could she have certainly avoided incurring the penalty of the statute? Avoidance in her case would have required the power to foresee the future and correctly prognosticate the outcome of the convention. No law, however, can constitutionally require prophetic power from an individual and punish him for not having such power. (*International Harvester Co. vs. Kentucky*, 234 U. S., 216.)

The exactions of this law upon the plaintiff-in-error are precisely analagous to the exactions of the Kentucky law condemned by this Court in the *International Harvester Co.* case. That statute made it unlawful for any number of persons to combine the crops of wheat, tobacco, corn, oats, hay or other market products raised by them "for the purpose of obtaining a higher price than they could get by selling them separately." The state courts in reviewing this and related statutes had declared the combination of such producers to be not in itself unlawful and had identified the criminality of the act proscribed with the price-fixing feature solely. This Court declared the problem what the price would have been had the lawful combination not been in existence, "a problem that no human ingenuity could solve." Such a law, by reason of the penalty which its infringement carried, deprived the producers of liberty and property without due process of law, because

"To compel them to guess on peril of indictment what the community would have given for them if the continually changing conditions were other than they are, to an un-

certain extent; to define prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess" (234 U. S., pages 223-4).

POINT VI.

The right of assembly is an element of the liberty which the due process clause protects. A statute which is applied to attach penal consequences to joining an organization still in its formative stage because that organization subsequently acquires over defendant's protest a questionable character, imposes a "previous restraint" upon the right of assembly and within the analogy of *Patterson vs. Colorado*, 205 U. S., 454, works a denial of due process.

It is now wholly clear upon authority as well as upon principle that the elementary civil rights are parts of that liberty which the due process clause protects. So it was declared in *Meyer vs. Nebraska* (262 U. S., 390, 399) of the right "to worship God according to the dictates of one's own conscience"; so this Court "might" and "did assume" in *Gitlow vs. New York* (45 Sup. Ct. Rep., 625, at page 630) of "freedom of speech and of the press"; so it was first of all declared of freedom of assembly itself (*U. S. vs. Cruikshank*, 92 U. S., 542, 551, 554):

"The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It 'derives its source,' to use the language of Chief Justice Marshall, in *Gibbons vs. Ogden*, 9 Wheat., 211, 'from those laws whose authority is ac-

knowledge by civilized man throughout the world.' It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection" (page 551).

*"The Fourteenth Amendment * * * furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society"* (page 554; our italics).

See the citation of this case in *Twining vs. N. J.*, 211 U. S., 78, 96-7.

What then is the limitation upon freedom of assembly which the Criminal Syndicalism Law of California, section 2, subdivision 4, as "applied in the present case" (*Gitlow vs. New York, supra*, at page 632), imposes? That statute says: You must not join an organization even for the purpose of lending your own power of persuasion and your own influence to insure its peaceable character if subsequently it acquires a quality the law condemns. You may not go to a meeting to advocate the use of lawful methods without subjecting yourself to criminal prosecution if the majority turns out to be against you.

It is unnecessary to do more than allude to the *policy* of such a statute,—its obvious effect in keeping orderly and law-abiding persons out of

organizations, and its necessary tendency to increase the likelihood that organizations will fall into the hands of the reckless and the violent. For the issue is wholly clear upon principle and authority applying by the closest analogy.

A statute, which by reason of subsequent events attaches penal consequences to assemblage, is by definition a prior restraint upon assemblage. And a prior restraint upon assemblage is constitutionally void.

Statutory restraints upon freedom of assembly have been almost unknown throughout the whole course of American constitutional law. Precise authorities are therefore lacking. There can, however, be no doubt where to turn for precedents,—namely to the law of free speech. The freedom of assembly and the freedom of speech and of the press are in effect parts of one general liberty of expression. At the very least the right of assemblage is as broad as the right of utterance. The liberty to listen manifestly cannot be subjected to greater restraints than the liberty to speak or write.

If then a prior restraint upon speech or writing is constitutionally void, so must be a prior restraint upon assemblage. That such a prior restraint is forbidden, the decisions, including the decisions of this Court, leave in no doubt. In *Patterson vs. Colorado* (205 U. S., 454, 462) this Court said of the free speech and free press principles:

“In the first place, the main purpose of such constitutional provisions is ‘to prevent all such *previous restraints* upon publica-

tions as had been practiced by other governments'." (*Citing authority, italics the Court's.*)

See also

Schenck vs. United States, 249 U. S., 47,
51,

and among many other cases,

Marlin Fire Arms Co. vs. Shields, 171
N. Y., 384;

Dearborn Pub. Co. vs. Fitzgerald, 271
Fed., 479, 482.

POINT VII.

The statute, which attaches penal consequences to attendance at a meeting for the purpose of addressing that meeting and urging orderly action, likewise imposes a prior restraint upon freedom of speech (*Patterson vs. Colorado*, 205 U. S., 454) and works a denial of due process.

It is not by analogy alone that the authorities upon freedom of speech and upon prior restraints apply to the case at bar. A statute which is construed and applied to make mere attendance at a meeting criminal by reason of the subsequent action there taken may include within its penalties—and in the case at bar did include within its penalties—one who attends for the purpose of addressing the meeting. It may include within its penalties—and in the case at bar did include within its penalties—one who addresses the meeting in opposition to that course of the majority which subsequently gave to the assemblage the quality to which objection is taken. Miss Whitney herself read to the meeting of November 9, 1919, the resolution in favor of political action.

Where a statute in fact operates as a prior restraint upon speech, it is wholly immaterial that that statute does not in terms mention speech. The legislation considered in *Louthan vs. Commonwealth* (79 Va., 197) made it unlawful for certain public officers, judges, superintendents of schools and the like “to participate actively in politics” and provided that

“making political speeches, or the active or unofficial participation in political meetings,

shall be deemed to be an active participation in politics within the meaning of this section."

The Virginia Court squarely held the statute invalid as a violation of the right of free speech. It denied the power of any

"legislative body, to seal the lips of citizens, and exclude them from the assemblies of the people, unless they will sit dumb among their fellowmen, and to forbid their holding communion with their fellow-citizens on governmental questions, to directly or indirectly influence the votes of others" (page 204).

To the same effect is

State vs. Junkin, 85 Neb., 1, 3.

See also

Ex Parte Harrison, 212 Mo., 88;

State vs. Pierce, 163 Wis., 615.

POINT VIII.

The right of association is an essential element of liberty (*Meyer vs. Nebraska*, 262 U. S., 390). A prior restraint upon association is upon principle and upon unbroken authority a denial of due process.

The historical analogy to the right of assembly is the analogy we have given to the right of free expression in speech and in the press. A clear logical analogy lies as well to what has frequently been defined as the right of association. Indeed the right of assembly is the most conspicuous illustration—most conspicuous because most favored by the policy of free institutions and therefore singled out by the constitutions of the United States and of the states—of a general right to associate. That right is one of “those privileges long recognized at common law as essential to the ordinary pursuit of happiness by free men” (*Meyer vs. Nebraska*, 262 U. S., 390, 399).

An unbroken course of decisions establishes that a previous restraint upon association is prohibited by the due process principle. In all of the cases listed below the attempt to limit the right of association failed and failed under the due process provision of the states. In those cases the attempt was to circumscribe the moral and physical contagion of vice and crime by making it criminal to associate with prostitutes, drunkards and the like.

St. Louis vs. Fitz, 53 Mo., 582;

St. Louis vs. Roche, 128 Mo., 541;

Ex parte Smith, 135 Mo., 223;
City of Lancaster vs. Reed, 207 S. W.,
 868 (Mo., 1919, not officially reported);
City of Watertown vs. Christnacht, 39
 S. D., 290;
Watertown vs. Barker, 39 S. D., 407.

To somewhat the same effect are:

Hechinger vs. City of Maysville, 22 Ky.
 L. Rep., 486;
Cady vs. Barnesville, 4 Weekly Cinc. Law
 Bull., 101;
Stoutenburgh vs. Frazier, 16 D. C. Ap-
 peals, 229.

The constitutional case against these statutes, while sufficient, was manifestly less cogent than the case against section 2, subdivision 4. The legislation there considered was passed in pursuance of the police power in its simplest form and subject to the principle which gives peculiar latitude to legislation directed against vice (compare e. g., *Scott vs. Donald*, 165 U. S., 58, 91); the legislation here considered is legislation in derogation of a basic constitutional right of freedom. Again, the legislation there considered was held constitutionally objectionable even when limited to persons consorting "with the intent to agree, conspire, combine or confederate" (*St. Louis vs. Roche*, supra, a leading case); the California Syndicalism Act as applied in Miss Whitney's case has resulted in her conviction despite a definite showing that her intent and her effort were in the fullest sense innocent.

In *Ex parte Smith*, supra (135 Mo. at 227), the Court said:

“We deny the power of any legislative body in this country to choose for our citizens whom their associates shall be,”

and, again:

“As to that portion of the eighth clause which uses the words ‘for the purpose or with the intent to agree, conspire, or combine or confederate to commit any offense,’ etc., it is quite enough to say that human laws and human agencies have not arrived at such a degree of perfection as to be able, without some overt act done, to discern and determine by what intent or purpose the human heart is actuated.”

POINT IX.

No quality of incitement attaches to the proceedings of the convention of November 9, 1919. Judged by the standards definitely laid down by this Court in *Gitlow vs. New York* (45 Sup. Ct., 625), Miss Whitney's conviction would have worked a denial of due process even had she participated in all the purposes and activities of the convention.

Our argument has presented from various points of view a single contention: It is a denial of due process to convict Miss Whitney of crime by reason of the quality which others gave to the convention of November 9, 1919. She cannot be charged, we have said, with the purposes of those she opposed but failed to convince. Our argument now goes further. Had she fully shared every purpose and participated in every action of the Communist Labor Party of California, her conviction still would have been a denial of due process,—a denial of those rights of free assembly and free speech which are foundations of that "liberty" the Fourteenth Amendment protects.

The due process clause, declared the Chief Justice in *Truax vs. Corrigan* (257 U. S., 312, page 332), supplies

"a required minimum of protection for everyone's right of life, liberty and property which the Congress or the legislature may not withhold."

What that "required minimum" in this precise field is, the late decision in *Gitlow vs. New*

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York (45 Sup. Ct., 625) makes clear. The state may punish "incitement" to violent action; it may punish incitement even in the absence of a showing of specific danger from the utterance. "The state cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale" (page 631). But nothing short of incitement is punishable.

In the *Gitlow* case this Court went on to a most detailed analysis of the Communist Manifesto, an analysis accompanied by full quotation. That analysis culminated in the declaration (page 629):

"The Manifesto, plainly, is neither the statement of abstract doctrine nor, as suggested by counsel, mere prediction that industrial disturbances and revolutionary mass strikes will result spontaneously in an inevitable process of evolution in the economic system. It advocates and urges in fervent language mass action which shall progressively foment industrial disturbances and through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government. It concludes with a call to action in these words:

'The proletariat revolution and the Communist reconstruction of society—the struggle for these—is now indispensable. * * * The Communist International calls the proletariat of the world to the final struggle.'

This is not the expression of philosophical abstraction, the mere prediction of future events; it is the language of direct incitement."

Such were the tests to which the Manifesto of the Communist Party was subjected in this court and by which in the view of the majority it was condemned; it remains merely to apply these same tests to the platform and program of the Communist Labor Party of California.*

The constitution and platform and program of the Communist Labor Party of California including the program of the National Chicago Convention—which was substituted for Miss Whitney's

*The Court will understand that the Communist and Communist Labor parties are wholly distinct bodies (Record, pages 88-89). The Department of Labor of the United States consistently held members of the Communist Party deportable under the act of October, 16, 1918, which provides for the deportation of aliens "who are members of or affiliated with any organization that entertains a belief in, teaches or advocates the overthrow by force or violence of the Government of the United States" (40 Stat., 1012, Chap. 186). In that ruling as to the Communist Party, it was sustained by the Courts (*Skeffington vs. Katzeff*, 277 Fed., 129; *U. S. vs. Wallis*, 268 Fed., 413). The Department of Labor, however, held membership in the Communist Labor Party no ground for deportation.

The opinion of the Labor Department in the case of one Carl Miller, which settled the practice, is quoted in a footnote to *Colyer vs. Skeffington* (265 Fed., at pages 65-68). After an analysis of the same platform and program printed in this record (page 171) the Secretary of Labor concluded:

"The excerpts from the Communist Labor Party platform and program quoted above indicate an extremely radical objective, but there is nothing in them that discloses an intention to use force or violence or that is incompatible with the use of parliamentary machinery to attain the radical end it has in view."

resolution—appear at pages 159-188. The great bulk of these pages is taken up with purely mechanical and formal provisions for the organization of committees and the like. The platform appears at pages 171-178. It is sufficient to refer to the sole passages to which the prosecution at the trial took objection. On page 176 appears the following:

“In any mention of revolutionary industrial unionism in this country, there must be recognized of [*sic*] the immense effect upon the American Labor movement of the propaganda and example of the Industrial Workers of the World, whose long and valiant struggles and heroic sacrifices in the class-war have earned the respect and affection of all workers everywhere. We greet the revolutionary industrial proletariat of America, and pledge them our wholehearted support and cooperation in their struggles against the capitalist class.”

This passing reference in a platform which was substituted for the resolution which Miss Whitney proposed and which was rejected, was made the basis for the admission of much evidence concerning the I. W. W. (see e. g., pages 221, 223). But it never was even argued as far as we know, and cannot be argued, that this generalized statement of collective sympathy was upon any possible construction an incitement, much less a “direct incitement.” This is the more plainly true as criminal activity was shown by the evidence not to be an *avowed* object at least of the I. W. W.;

the lawless practices the prosecution stressed were, according to its own witnesses, agreed upon in secret outside of the regular meetings (pages 258-9; 227-8); many of the "rank and file" of the I. W. W. "knew nothing about it at all" (286-7).

The prosecution laid much stress (see the cross examination of Miss Whitney, pages 310-21) upon the following resolution:

"Resolutions Committee recommends that the C. L. P. use all its strength and energy in the organization and education of the workers to utilize to the full extent their collective power to force the unconditional release of each and every one now serving sentence as a political or class war prisoner" (page 103).

Even more plainly is this "recommendation" no "incitement" to anything. It was, in Miss Whitney's own words "absolutely not," introduced with any intention of incitement (page 335).*

*Much supposedly incendiary literature was received in evidence. Its identification was through "a witness who had seized certain documents of the I. W. W." (page 223) and the only ground for receiving the documents was the alleged recommendation of them as propaganda by the I. W. W. convention of 1916 in Chicago (page 225; see generally pages 224-249). These documents included I. W. W. songs (pages 236-243), books or pamphlets by one Perry (page 233), by one St. John (page 234), by William Haywood (page 243), by one Pouget (page 246), with an extract read to the jury from Giovannitti "Essex Co. Jail, Lawrence, Mass, August, 1912" (page 249), by one Walker Smith (page 249), and by Miss Flynn (page 272). The only document connected with the Communist Labor Party consists of five scattered paragraphs (pages 217-219) of a book

POINT X.

The California Criminal Syndicalism Law, and especially Section 2, Subdivision 4 thereof—by confining its penalties to advocates of change and especially of “change in industrial ownership or control”—discriminates between differing political and economic opinions and their respective supporters and thus denies the equal protection of the laws. (*Truax vs. Corrigan*, 257 U. S., 312.)

The Chief Justice in *Truax vs. Corrigan*, pointed out the relation and the difference between the due process and the equal protection provisions. The one guarantees a “required minimum” of liberty; the other “‘is a pledge of the protection of equal laws’.” (*Yick Wo vs. Hopkins*, 118 U. S., 356, 369, quoted at 257 U. S., 333.)

The law under review, especially in the penalties it imposes in its membership provisions is, an *unequal* law. Like the Arizona statute before this court in the *Truax* case, this statute deals with “industrial” conflict. From the opposite direction, but in quite the same degree, it discriminates between parties to that conflict and denies equal protection. Organizing, being a member

on Syndicalism by Ford and Foster (page 216) which Police Captain Kyle seized at Loring Hall (page 209). (He estimated the amount of his seizure as “around a ton” [page 209].) The work was never mentioned as far as the record shows at the convention of November 9, 1919, or at any of the proceedings of any of the bodies mentioned in the case. The specific statement of the District Attorney in his opening that at Miss Whitney’s home the officers found “radical and red literature” (page 72) is absolutely unsubstantiated by any evidence in the record (see *supra* this brief, page 9, footnote).

of, and assembling with, organizations or groups whose purpose is terrorism and unlawful destruction of property become punishable only if the purpose of these bodies is political or *industrial* change; there is no restraint upon joining any organization, whatever its purposes or methods, and however clearly they are avowed, whose object is maintenance of the existing order. Two organizations or two meetings may both be parties to the same political and industrial conflict and the methods practiced by both may be identical. Concretely applying the California Statute to the case of two organizations so widely known as the Ku Klux Klan and I. W. W. and assuming, for the purpose of argument and illustration, that the same methods of terrorism were employed by some of the members of both organizations, the result would be that a member of the Ku Klux Klan could be convicted for the outrage only in accordance with the ordinary rules of conspiracy—upon proof that he was consciously a party to it; but a member of the I. W. W. could be convicted upon mere proof of membership itself.

It is no answer to this to argue, as the prosecution has argued, that the statute operates upon all social classes alike and that Miss Whitney herself may have been a woman of position or wealth. The inequality urged is not precisely between members of different economic or social classes. The inequality of the statute is that it subjects persons who differ in opinion to differing rules of law.

The two groups of contentions developed respectively in Points I-II and in Points III-X, are

independent. No conviction for any offense can stand, where that offense itself is specified neither in the indictment nor in the course of the trial, nor in the charge; to convict anyone of any felony in such circumstances is to deprive him of liberty without due process of law. Again, had the forms of procedure been the most technically regular conceivable, Miss Whitney's conviction would still have been a deprivation of liberty without "due process": her own acts were demonstrably innocent and she cannot constitutionally be condemned because others rejected the purposes she held, avowed and defended.

While thus separately stated and independently valid, the effect of the two sets of principles upon which we have relied is cumulative: Miss Whitney was in fact prosecuted without discrimination upon a number of unspecified and undifferentiated accusations. Conditions of time and space—to mention no others—should have precluded once and for all even the submission of all but one of the supposed issues as in themselves substantive bases of conviction; a conviction upon that one, a half-dozen formulations of the due process principle forbid.

For *each* of the following reasons—and for *all* of them—Miss Whitney's conviction was a violation of due process:

Because it was her right to know "the essential particulars of the offense, so that she might appear in court prepared to meet every feature of the accusation against her" (*Hodgson vs. Vermont*), and that right was denied her—denied so completely as to render wholly possible a second prosecution by reason of the same facts;

Because "the criminal intent essential to the commission of a crime must exist when the act complained of is done." "Upon principle" one cannot be declared guilty of crime "upon the happening of a subsequent event, not perhaps in the contemplation of the party, and which may be brought about, against his will, by the agency of another" (*U. S. vs. Fox*);

Because "it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime" (*McFarland vs. Amer. Sugar Co.*),—least of all (by doing away with "corrupt intent") guilty of conspiracy;

Because no legislature may "exact gifts that mankind does not possess" and impose criminal penalties for a lack of "prophetic" understanding (*Int. Harvester Co. vs. Ky.*);

Because the exercise of those elementary rights of free assemblage and free speech which lie at the foundation of liberty may not be subjected to "previous restraint" (*Patterson vs. Colorado*);

Because no "legislative body" may "choose for our citizens who their associates shall be" (*ex parte Smith*);

Because the state may prohibit "direct incitement" alone (*Gitlow vs. New York*), and even the platform which, over Miss Whitney's opposition, was substituted for her own resolution, shows no incitement, direct or indirect.

The conviction should be reversed and the plaintiff-in-error discharged.

Dated, September 4, 1925, and respectfully submitted,

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APPENDIX A.**THE CRIMINAL SYNDICALISM ACT OF CALIFORNIA.**

Act 5086—An Act defining criminal syndicalism and sabotage, proscribing certain acts and methods in connection therewith and in pursuance thereof and providing penalties and punishments therefor.

History: Approved April 30, 1919. In effect immediately. States. 1919, page 281.

Criminal syndicalism defined.

#1. The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.

Unlawful acts. Penalty.

#2. Any person who:

1. By spoken, or written words or personal conduct advocates, teaches or aids and abets criminal syndicalism or the duty, necessity or propriety of committing crime, sabotage, violence or any unlawful method of terrorism as a means of accomplishing a change in in-

dustrial ownership or control, or effecting any political change; or

2. Wilfully and deliberately by spoken or written words justifies or attempts to justify criminal syndicalism or the commission or attempt to commit crime, sabotage, violence or unlawful methods of terrorism with intent to approve, advocate or further the doctrine of criminal syndicalism; or

3. Prints, publishes, edits, issues or circulates or publicly displays any book, paper, pamphlet, document, poster or written or printed matter in any other form, containing or carrying written or printed advocacy, teaching, or aid and abetment of, or advising, criminal syndicalism; or

4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism; or

5. Wilfully by personal actor conduct, practices or commits any act advised, advocated, taught or aided and abetted by the doctrine or precept of criminal syndicalism, with intent to accomplish a change in industrial ownership or control, or effecting any political change;

Is guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than fourteen years.

Constitutionality.

#3. If for any reason any section, clause or provision of this act shall by any court be held unconstitutional then the legislature hereby declares that irrespective of the unconstitutionality so determined of such section, clause or provision, it would have enacted and made the law of this state all other sections, clauses and provisions of this act.

Urgency measure.

#4. Inasmuch as this act concerns and is necessary to the immediate preservation of the public peace and safety, for the reason that at the present time large numbers of persons are going from place to place in this state, advocating, teaching and practicing criminal syndicalism, this act shall take effect upon approval by the governor.

APPENDIX B.
IN SUPERIOR COURT,
ALAMEDA COUNTY.

THE PEOPLE OF THE STATE OF CALIFORNIA
against
CHARLOTTE A. WHITNEY.

Information—Filed Dec. 30, 1919.

In the Superior Court of the County of Alameda, State of California, the 30th day of December, A. D. nineteen hundred and nineteen, Charlotte A. Whitney, is accused by the District Attorney of the said County of Alameda by this information of the crime of felony, to wit: a violation of an Act entitled, "An Act defining criminal syndicalism and sabotage, proscribing certain acts and methods in connection therewith, and in pursuance thereof, and providing penalties and punishments therefor," approval April 30th, 1919, committed as follows: The said Charlotte A Whitney prior to the time of filing this information, and on or about the 28th day of November, A. D. nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlawfully, wilfully, wrongfully, deliberately and feloniously organize and assist

in organizing, and was, is, and knowingly became a member of an organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism.

And all of the acts of the said Charlotte A. Whitney in the premises were and are contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the People of the State of California.

Second Count. And the said Charlotte A. Whitney is accused by the District Attorney of said County of Alameda by this information of the crime of felony, to wit: a violation of an Act entitled "An Act defining criminal syndicalism and sabotage, proscribing certain acts and methods in connection therewith, and in pursuance thereof, and providing penalties and punishments therefor," approved April 30, 1919, committed as follows: The said Charlotte A. Whitney, prior to the time of filing this information, and on or about the 28th day of November, A. D. nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlawfully, wilfully, wrongfully, deliberately and feloniously print, publish, edit, issue, circulate and publicly display books, papers, pamphlets, documents, posters and written and printed matter containing and carrying written and printed advocacy, teaching and aid and abetment of, and advising, criminal syndicalism.

And all of the acts of the said Charlotte A. Whitney in the premises were and are contrary to the form, force and effect of the statute in such

case made and provided, and against the peace and dignity of the people of the State of California.

Third Count. And the said Charlotte A. Whitney is accused by the District Attorney of said County of Alameda by this information of the crime of felony, to-wit, a violation of an Act entitled "An act defining criminal syndicalism and sabotage, proscribing certain acts and methods in connection therewith, and in pursuance thereof and providing penalties and punishments therefor," approved April 30th, 1919, committed as follows: The said Charlotte A. Whitney, prior to the time of filing this information, and on or about the 28th day of November A. D., nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlawfully, wilfully, deliberately and feloniously by spoken and written words, and by personal conduct advocate, teach, aid and abet criminal syndicalism, and the duty, necessity and propriety of committing crime, sabotage, violence and unlawful methods of terrorism as a means of accomplishing a change in industrial ownership and control, and as a means of effecting a political change;

And all of the acts of the said Charlotte A. Whitney in the premises were and are contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the People of the State of California.

Fourth Count. And the said Charlotte A. Whitney is accused by the District Attorney of said County of Alameda by this information of the

crime of felony, to wit, a violation of an Act entitled "An Act defining criminal syndicalism and sabotage, proscribing certain acts and methods in connection therewith, and in pursuance thereof and providing penalties and punishment therefor," approved April 30th, 1919, committed as follows: The said Charlotte A. Whitney prior to the time of filing this information, and on or about the 28th day of November, A. D., nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlawfully, wilfully, wrongfully, deliberately and feloniously, by spoken and written words justify and attempt to justify criminal syndicalism and the commission and attempt to commit crime, sabotage, violence, and unlawful methods of terrorism with intent then and there to approve, advocate and further the doctrine of criminal syndicalism;

And all of the acts of the said Charlotte A. Whitney, in the premises were and are contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the People of the State of California;

Fifth Count. And the said Charlotte A. Whitney is accused by the District Attorney of said County of Alameda by this information of the crime of felony, to-wit, a violation of an Act entitled, "An act defining criminal syndicalism and sabotage, proscribing certain acts and methods in connection therewith, and in pursuance thereof and providing penalties and punishment therefor," approved April 30th, 1919, committed as follows, to-wit: The said Charlotte A. Whitney

prior to the time of filing this information, and on or about the 28th day of November, A. D., nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlawfully, wrongfully, wilfully, deliberately and feloniously by personal acts and conduct practice and commit acts, advised, advocated, taught and aided and abetted by the doctrine and precept of criminal syndicalism with intent to accomplish a change in industrial ownership and control and effecting a political change;

And all of the acts of the said Charlotte A. Whitney in the premises were and are contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the People of the State of California.

Ezra W. Decoto, District Attorney in and for said County of Alameda, State of California, by A. A. Rogers, Deputy District Attorney in and for the County of Alameda, State of California. Geo. E. Gross, Clerk, by L. A. Rudolph, Deputy Clerk. Ezra W. Decoto, District Attorney, by A. A. Rogers, Deputy District Attorney in and for the County of Alameda, State of California. (File endorsement omitted.)

APPENDIX C.*California Penal Code.*

§1176. *Written charges need not be excepted to.* When written instructions have been presented, and given, modified, or refused, or when the charge of the court has been taken down by the reporter, the questions presented in such instructions or charged need not be excepted to or embodied in a bill of exceptions; but the Judge must make and sign an indorsement upon such instructions, showing the action of the court thereon, and certify to the correctness of the reporter's transcript of the charge; and thereupon the same, with the endorsements, become a part of the record, and any error in the action of the court thereon may be reviewed on appeal in like manner as if presented in a bill of exceptions. [Amendment approved 1905; Stats. 1905, page 762.]

§1259. *Appellate court may review what.* Upon an appeal taken by the defendant in open court, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby (Amendment approved 1909; Stats. 1909, page 1088).

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Office Supreme Court
FILED
NOV 27 1925
WM. R. STANLEY

IN THE
Supreme Court of the United States
OCTOBER TERM, 1925—No. 10. 3

CHARLOTTE ANITA WHITNEY,
Plaintiff-in-Error,

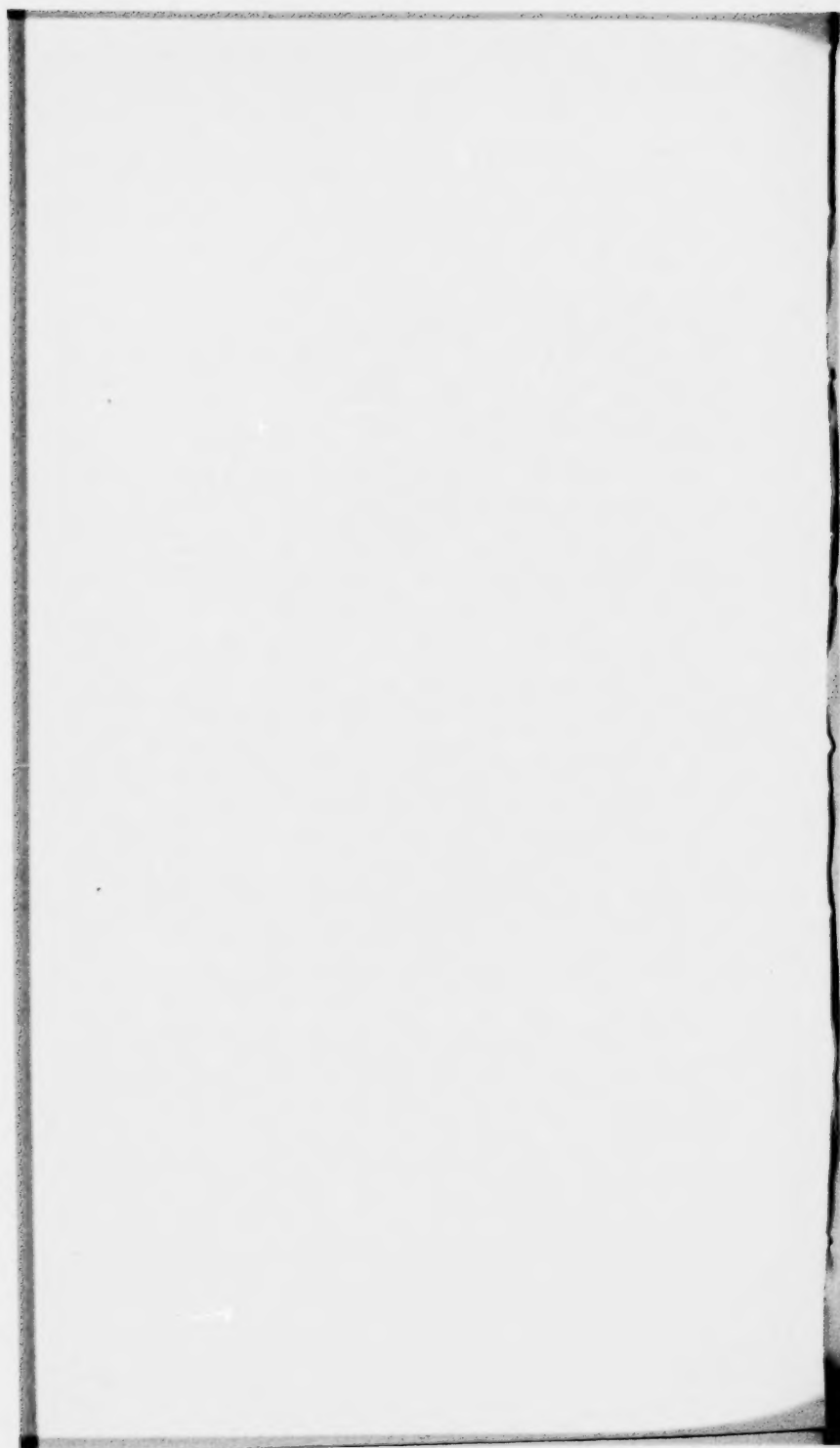
against

THE PEOPLE OF THE STATE OF
CALIFORNIA,
Defendant-in-Error.

IN ERROR TO THE DISTRICT COURT OF APPEAL, FIRST
APPELLATE DISTRICT, DIVISION ONE,
STATE OF CALIFORNIA.

PETITION FOR REHEARING.

GALLO & ACKERMAN, INC., 107 Liberty St. and 6 Church St., N. Y.



IN THE
Supreme Court of the United States
OCTOBER TERM, 1925—No. 10.

CHARLOTTE ANITA WHITNEY,
Plaintiff-in-Error,

against

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant-in-Error.

IN ERROR TO THE DISTRICT COURT OF APPEAL, FIRST
APPELLATE DISTRICT, DIVISION ONE,
STATE OF CALIFORNIA.

PETITION FOR REHEARING.

Plaintiff-in-error petitions for a rehearing of her cause upon the following ground:

That in dismissing her cause "for want of jurisdiction upon the authority of Section 237 of the Judicial Code as amended by the Act of September 6, 1916, c. 448, sec. 2, 39 Stat., 726," this court acted under a misapprehension of the facts and

erroneously doubted the accuracy of the statement contained in the order (Record, page 337) of the District Court of Appeal, First Appellate District, Division 1, of the State of California, dated December 9, 1924, which said order was part of the record of said cause in this court, and which amended the record by inserting therein the following statement:

"The question whether the California Criminal Syndicalism Act (Statutes 1919, page 281) and its application in this case is repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States, providing that no state shall deprive any person of life, liberty, or property, without due process of law, and that all persons shall be accorded the equal protection of the laws, was considered and passed upon by this Court."

This order and the stipulation upon which it was entered did not constitute an attempt to confer jurisdiction upon this court by consent. On the contrary, the stipulation and order stated the actual facts concerning the raising of the afore-said Federal questions in the California District Court of Appeal, and the stipulation was entered into and the order was made for the purpose of enabling these actual facts to appear in the record.

The raising of these Federal questions in the District Court of Appeal is shown by the briefs submitted in that court in behalf of plaintiff-in-error. Copies of these briefs (omitting passages

which are wholly immaterial and italicizing those which are for the present purpose most important) are submitted herewith in an appendix separately printed, as Exhibits A, B and C, being respectively plaintiff-in-error's opening, closing and supplemental briefs submitted to that Court.

These briefs are submitted not as being in themselves parts of the record (which of course they are not [*Zadig vs. Baldwin*, 166 U. S., 485]), but as establishing the complete accuracy of the statement in the order—which *is* a part of the record—that the issues of Federal constitutional law were raised in the California District Court of Appeal and there decided against plaintiff-in-error. Counsel for plaintiff-in-error pressed these claims of Federal Constitutional right in the California District Court of Appeal even though "conscious of the fact that in passing upon an application for a writ of prohibition the Supreme Court of the State of California had rendered an opinion stating—'We see no merit in the claim that the act under which petitioner is being prosecuted is invalid as being in violation of the federal and state constitution.' " (See Appendix, page XXXI; the reference is to *Whitney vs. Superior Court*, 182 Cal., 114.)

(1) At page 19 of plaintiff-in-error's closing brief in the California District Court of Appeal (Exhibit B, page XXXII), appears the following:

"Appellant respectfully urges that the Criminal Syndicalism Law of the State of

California, as it stands, is violative of the Fourteenth Amendment to the Constitution of the United States."

(2) In the pages immediately following (see pages 19-28 of closing brief, Exhibit B, pages XXXII-XLVII) the statute's violation of the equal protection clause of the Fourteenth Amendment by reason of its unjust discrimination between those who oppose and those who favor change in industrial ownership is argued (with copious references to authorities—see especially quotations from the opinions in *American Sugar Refining Co. vs. MacFarland*, 229 Fed., 284, at page 25 of closing brief, Exh. B, page XLI and in *re VanHorn*, 70 Atl., 986, at page 26 of closing brief, Exh. B, page XLIV—where the equal protection clause of the Fourteenth Amendment is specifically mentioned).

(3) Continuing the claim of protection under the Fourteenth Amendment, plaintiff-in-error raised the specific constitutional objection of vagueness in the following words at page 28 of closing brief (Exhibit B, page XLVII):

"Again the Statute is open to constitutional objection on the ground that its terms are vague and not susceptible of definition."

This necessarily raised a due process question (Compare *U. S. vs. Cohen Grocery Co.*, 255 U. S., 81, page 89; see also *International Harvester Co. vs. Kentucky*, 234 U. S., 216).

(4) Plaintiff-in-error's claim that the California Criminal Syndicalism Law violates the constitutional right of freedom of speech, assembly, etc., was made in her opening brief in the California District Court of Appeal (see pages 39-40, 2-3 of opening brief, Exh. A, pages XIX, II), and again in her closing brief (pages 17, 29 of closing brief, Exh. B, pages XXX, XLVIII). These rights are protected by the due process clause of the Fourteenth Amendment of the Constitution of the United States (*Gitlow vs. U. S.*, 45 Sup. Ct., 625).

This Court has held that a specific reference to the particular section of the Constitution which is violated is not necessary (*Clyde vs. Gilchrist*, 262 U. S., 94, 97), nor indeed any reference in terms to the Constitution of the United States provided the objection taken is by its very nature one arising under the Constitution of the United States (*Spencer vs. Merchant*, 125 U. S., 345, page 352). (That there is no need of formality in raising the Federal question, see *Murray vs. Charleston*, 96 U. S., 432, page 442.)

(5) The question of the violation of the most fundamental principles of due process by the conviction of plaintiff-in-error, without her or her counsel's being informed of the exact nature of the accusation against her and without protection against double jeopardy, was repeatedly raised (opening brief, pages 11-13, Exh. A, pages III-IV; pages 26-28, Exh. A, pages XVII-XVIII; pages 15-16, Exh. A, pages VII-VIII; page 23, Exh. A, page XIV; supplemental brief, pages 5-6, Exh. C, page LV). At page 12 of the opening

brief (Exh. A, page IV), specific reference is made to the *Constitutional* right of every accused to be informed of the nature of the accusation against him.*

This analysis shows not only that issues of Federal constitutional right were in fact urged upon the California court, but that these issues were urged with surprising insistence, vigor and variety of attack. As late as 1922 this court itself in a dictum (*Prudential Insurance Co. vs. Check*, 259 U. S., 530, 538) denied that freedom of speech was protected by the Fourteenth Amendment, a position only corrected in *Gillow vs. New York* (45 Sup. Ct., 625, decided in 1925).

In the brief submitted by plaintiff-in-error in this Court all of these points were argued (Points I, V, VI, VII, VIII, IX) and additional arguments were adduced supporting plaintiff-in-error's contention that the statute as applied in her case violated the due process clause of the Fourteenth Amendment. Upon the authority of *Dewey vs. Des Moines* (173 U. S., 193, at page 198) parties are not confined to the same arguments advanced in the Courts below upon the federal questions involved.

The question whether the California Criminal Syndicalism Act and its application in this case violated the due process clause and the equal protection clause of the Fourteenth Amendment of

*Rights under the Federal Constitution were again urged by plaintiff-in-error in her unsuccessful application to the California Supreme Court to review the decision of the District Court of Appeal. Her petition to the California Supreme Court was in this regard identical—with the slightest verbal changes—with the closing brief in the District Court of Appeal attached hereto as Exhibit B.

the United States Constitution, having thus been raised by the briefs in the California District Court of Appeal, the order of that Court—which amended the record and was itself part of the record—shows conclusively that these Federal questions were not raised too late under the state practice and were passed upon by the state court (*Cincinnati Packet Co. vs. Bay*, 200 U. S., 179, page 182; compare *Miedreich vs. Lauenstein*, 232 U. S., 236). This order of the California District Court of Appeal—which, by reason of the refusal (Record, page 1) of the State Supreme Court to review the District Court's decision, became the court of last resort—was an order of the Court (see for the form, the judgment [Record, page 1] and the order allowing writ of error [page 11]; compare *Consolidated Turnpike Co. vs. Norfolk Railway Co.*, 228 U. S., 596, page 598).

The failure of Judge Richards in his opinion to mention any of the Federal questions thus presented to the California District Court of Appeal by plaintiff-in-error's briefs, is explained by the fact that the question of the constitutionality of the California Criminal Syndicalism Act both under the State and Federal Constitutions, had been determined adversely to plaintiff-in-error upon her previous application for a writ of prohibition which was denied by the Supreme Court of California (*Whitney vs. Superior Court*, 182 Cal., 114). The Supreme Court of the state there said:

“We see no merit in the claim that the act under which petitioner is being prosecuted is invalid as being in violation of the *federal* and state constitution.” (Our italics.)

In the circumstances—with no discussion of the Federal constitutional contentions in the opinion of “the highest court of the state in which a decision in the suit could be had”—the practice here adopted was the necessary and inevitable practice. The briefs in the state court cannot be made a part of the record; the arguments in the state court are as matter of usual practice not preserved in any form. Unless a certificate or order of the state court were sufficient it would, in such a situation, be absolutely impossible to establish that there had been “drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution of the United States.”

That the practice here adopted *was* the correct practice and that plaintiff-in-error is entitled to a re-hearing is established by the precise authority of this Court in *Consolidated Turnpike Co. vs. Norfolk Railway Co.* (228 U. S., 596). A writ of error “under section 709 Revised Statutes, now section 237 of the new Judicial Code” had been dismissed (228 U. S., 326, 330), on the ground that no federal question had been sufficiently raised in the Virginia courts. In support of an application for a rehearing it was pointed out (228 U. S., at page 598), that the certificate of the presiding judge “contains a recital to the effect that ‘the Court orders it to be certified and made a part of the record in this case, and the Honorable James Keith, President Judge of said Supreme Court of Appeals, does now certify,’ ” etc. This Court upon the petition for a rehearing decided at page 599 that

“to prevent any possible inference that there was any intention to doubt in the slightest degree the accuracy of the statement contained in the certificate of the presiding judge of the court below, we have concluded that as it is recited in the certificate that it was made by the order of the court itself for the purpose of affording record evidence of the fact that a Federal question was considered and disposed of, that we may treat the certificate to that effect as incorporating into the record the necessary proof of the existence of some Federal question as the basis upon which our authority to review may be exerted.”

A similar practice was involved and a like ruling made in the late case of *Gillow vs. New York*. Application was made to Mr. Justice Brandeis for a writ of error. He questioned whether the remittitur of the New York Court of Appeals showed with sufficient certainty that Federal questions under the Fourteenth Amendment had been before the New York court. A motion was therefore made in the Court of Appeals to amend the remittitur by court order showing this fact. The remittitur was amended by a recital in the precise form of the recital in this case that the question of the constitutionality of the statute and of its application “was considered and passed upon.” Application for a writ of error was made to the full bench of this court and was granted (260 U. S., 703), and this court proceeded to review the case upon its merits (45 Sup. Ct., 625).

Wherefore, plaintiff-in-error prays that an order may be made for a re-hearing of this cause.

CHARLOTTE ANITA WHITNEY,
Plaintiff-in-Error,

By
JOHN FRANCIS NEYLAN,
THOMAS LLOYD LENNON,
of San Francisco,

WALTER NELLES,
WALTER H. POLLAK,
of New York City,
Attorneys for Plaintiff-in-Error.

Certificate of Counsel.

We hereby certify that we are the counsel for the plaintiff-in-error here, that the foregoing petition for a re-hearing is not interposed for delay and that in our judgment the said petition is well founded.

JOHN FRANCIS NEYLAN,
THOMAS LLOYD LENNON,
of San Francisco,

WALTER NELLES,
WALTER H. POLLAK,
of New York City,
Attorneys for Plaintiff-in-Error.

NOV 28 19

WM. R. STANS

IN THE
Supreme Court of the United States

OCTOBER TERM, 1925—No. 10.

3

CHARLOTTE ANITA WHITNEY,
Plaintiff-in-Error,

against

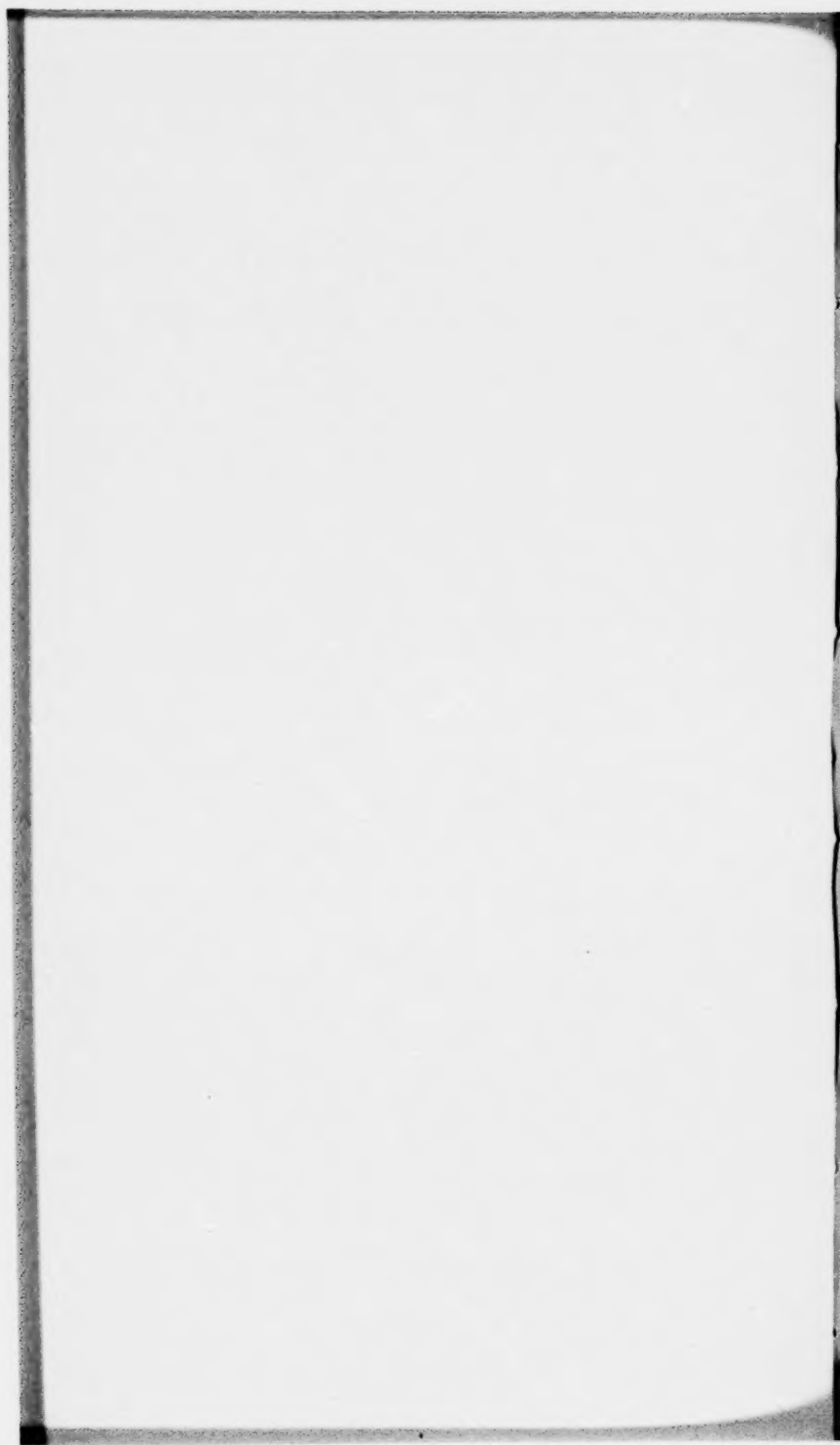
THE PEOPLE OF THE STATE OF
CALIFORNIA,
Defendant-in-Error.

IN ERROR TO THE DISTRICT COURT OF APPEAL, FIRST
APPELLATE DISTRICT, DIVISION ONE,
STATE OF CALIFORNIA.

APPENDIX TO PETITION FOR REHEARING,

Showing the Correctness of the Statement which
the Order of the California District Court
of Appeal Made Part of the Record, that
Federal Rights Under the Fourteenth Amend-
ment were Claimed in that Court.

GALLO & ACKERMAN, INC., 107 Liberty St. and 6 Church St., N. Y.



APPENDIX.

Opening Brief for Appellant in California
District Court of Appeal—Exhibit
Apages i-xxii

Closing Brief for Appellant in California
District Court of Appeal—Exhibit
Bpages xxiii-xlvi

Supplemental Brief for Appellant in Cali-
fornia District Court of Appeal—Ex-
hibit Cpages xlix-lviii

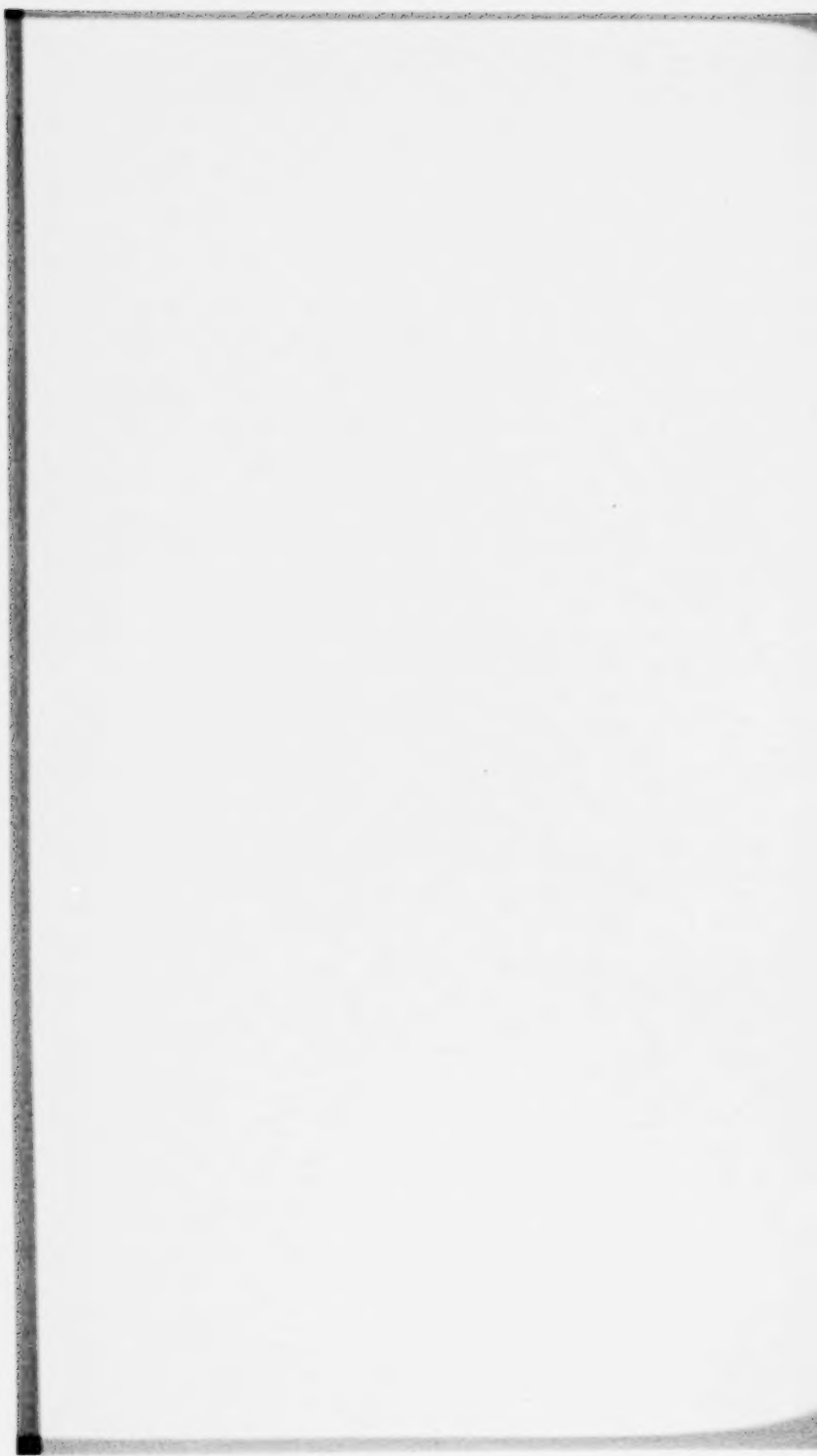


Exhibit A.

Criminal
No. 907

IN THE

DISTRICT COURT OF APPEAL,

STATE OF CALIFORNIA.

FIRST APPELLATE DISTRICT—DIVISION ONE.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.

CHARLOTTE A. WHITNEY,
Defendant and Appellant.

APPELLANT'S OPENING BRIEF.

The defendant and appellant in this cause is a refined, cultured, intellectual woman who has spent her life and private fortune in charitable and philanthropic work for the relief and betterment of her fellowmen. This [page 2] characterization is not based upon any matters or things *dehors* the record in this case; it finds abundant support in the transcript, a transcript which does not contain a shred or syllable of evidence showing, or tending to show, that the appellant ever

by thought, word or deed, broke or advocated the breach, of any law of the land. She was convicted in the court below and sentenced to a term of from one to fourteen years in the state penitentiary on an information that charges no crime, on evidence that proves the commission of no crime. She was convicted, not because of anything that she herself ever did, not even because of anything that she herself ever *said*;—but because of the crimes and misdeeds of others,—crimes with which she was not shown to have had the remotest connection, and which it was not contended that she ever advised, counselled or ratified. She was convicted merely because of her membership in a political party which held, or rather was deemed by the police force of the City of Oakland to have held, radical views on social and economic questions.

We believe that the decision of this honorable court in this cause will have vast and far-reaching consequences. *A reversal of this conviction will have incalculable value in maintaining and safe-*
 [page 3] *guarding the constitutional rights of free thought, free speech and free assemblage;* it will serve as a well-merited rebuke to those who in the name of law and order, are guilty of the most flagrant and reprehensible violations of the law. We present this appeal with the utmost confidence in the justice of our cause and in the learning, wisdom and absolute fairness of the judges of this honorable court.

• • • • •

(Omitted as immaterial.)

• • • • •

[Page 7] **I. The Information Does Not State a Public Offense, and the Demurrer Should Have Been Sustained.**

• • • • •

(Omitted as immaterial.)

• • • • •

[Page 11] The defendant demurred to each of the several counts of the information for failure to state a public offense, for failure to state any particulars of the offense charged, or to state the acts constituting the offense in ordinary and concise language so as to enable a person of common understanding to know what was intended, and for lack of directness and certainty. This demurrer was overruled by the trial judge. We believe that it should have been sustained as to each of the counts, and cases by the hundred might be cited in support of such contention, but in view of the fact that no verdict was reached on the last four counts, and that the same were ultimately dismissed, we shall confine this portion of the brief to a discussion of the first count—the one on which appellant was convicted. If that count charges no crime, such failure is not cured by the verdict, and the judgment must of necessity be reversed.

Let us say at the outset, that we are not unmindful of the fact that the appellate [page 12] courts of this state since the adoption of Section 4½ of Article 6 of the Constitution, have, with some degree of frequency, refused to reverse convictions because of technical errors and defects

in indictments and informations. But it has never been contended that that section was designed to do away in toto with the well-established rules of criminal pleading or to abrogate the time-honored and constitutional right of every accused person "to be informed of the nature of the accusation against him." Only by some such construction can the first count of this information be upheld, for it violates every known rule and principle of criminal pleading; it is insufficient, not only under the plain provisions of the Penal Code, but under the rules laid down by every text writer on criminal law from Hale to Wharton, and by the decisions of every court the basis of whose jurisprudence is the common law of England. As a pleading, it stands beside the fictitious information framed by the brilliant and witty Justice Henshaw to illustrate his argument in *People vs. Greisheimer*, 176 Cal., 44—an information charging that A "killed a man." And truth again is stranger than fiction, for the information in the case at bar is even less direct and certain as to the offense attempted to be charged than is Judge [page 13] Henshaw's imaginary pleading. Among the many defects, uncertainties, and insufficiencies in the first count, we may note the following:

In the first place, it is merely alleged that the defendant organized, assisted in organizing, and became a member of *an organization*. The organization is not named, neither is it described in any manner whatever. If the organization referred to had a name or a common designation, it should have been set forth. If it had no name or definite designation, that fact should have been stated, and some descriptive phrases should have

been used. In the trial of the cause the District Attorney offered proof tending to show that the defendant actually joined an organization or political party known as the Communist Labor Party. Certainly it would have been easy for the District Attorney to have pleaded the name of such organization in the information. For all that appears from the information, the unlawful organization or society which the defendant is accused of organizing might be the Democratic Party, the Methodist Church, the Knights of Columbus, or the Ladies' Aid Society. Furthermore, while it is alleged that she became a member of an organization, etc., of persons organizing and assembling, to advocate, teach, aid and abet criminal syndicalism, it is not alleged in the first [page 14] count and cannot be ascertained therefrom how or in what manner or by what means the said organization would or could or did *advocate* or *teach* or *aid* or *abet* criminal syndicalism, neither is it alleged what the criminal syndicalism consisted of, and none of the facts or circumstances constituting the same are set forth. Plainly, these allegations in the information are merely conclusions of the pleader, and are not in any sense of the word a *statement of the acts* constituting the offense attempted to be charged. The information is fully as insufficient as would be an information which merely charged that the defendant on a certain day "committed the crime of burglary," without naming or describing the premises or stating the intent with which the entry was made.

It is a fundamental rule of criminal pleading that where the statute itself so describes the par-

particulars constituting the crime that the statutory language is sufficient to apprise the defendant of the nature of the act with which he stands charged, an indictment or information drawn in the language of the statute is sufficient, but the rule is otherwise where the statute uses general language, or employs generic terms which are not in themselves a statement of the acts constituting the offense. In the latter case the particulars of the alleged crime must be set forth. It is an elementary rule that an indictment or information should contain such a specification of acts and descriptive circumstances as will on its face, fix and determine the identity of the offense with such particularity as to enable the accused to know exactly what he has to meet and avail himself of a conviction or acquittal as a bar to further prosecution arising out of the same facts.

Wingard vs. State, 13 Geo., 396;
Harne vs. State, 39 Md., 552;
Commonwealth vs. Terry, 114 Mass., 263;
State vs. McGinnis, 126 Mo., 564;
Moline vs. State, 67 Nebr., 164; 93 Northwestern, 228;
State vs. Pirlot, 19 R. I., 695; 36 Atlan., 715;
Bishop vs. Commonwealth, 13 Gratt., 785;
U. S. vs. Cruikshank, 92 U. S., 542;
State vs. Shirer, 20 S. C., 392;
Peters vs. U. S., 94 Feo., 127.

In the case at bar, the statute makes use of generic terms and words having a general meaning. Criminal syndicalism, as defined in Section 1 of the act, means a number of things. It may mean the teaching or advocating or aiding or abetting crime. It may mean sabotage or malicious physical damage to personal property. It [page 16] may mean unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control or effecting any political change. These terms employed by the statute are general in their scope and have varying significance. To charge an offense under this act in the mere language of the statute without setting forth any particulars whatsoever does not apprise the accused of the nature of the accusation against him. Furthermore, the information in question does not even follow the language of the statute, insufficient and faulty as such a course would be. It merely uses the words "criminal syndicalism" without even the statutory description and definition of the same.

It does not set forth how or in what manner the unnamed organization referred to, proposed to or did teach or aid or abet criminal syndicalism, nor does it appear what form of criminal syndicalism the unnamed organization was formed to promote. Clearly, the information does not, to use the language of Section 950 of the Penal Code,

"contain a statement of the *acts* constituting the offense in ordinary and concise language and in such manner as to enable a per-

son of common understanding to know what is intended.”

[Page 17] At the risk of being tedious and of seeming to argue the truth of a self-evident and axiomatic proposition, we beg leave to call the attention of the court to a few authorities in support of the foregoing specifications. In *People vs. Mahony*, 145 Cal., 104, the court had under consideration an indictment based upon the provisions of Section 72 of the Penal Code for the presentation of a false and fraudulent claim against the county. In that case, Chief Justice Angellotti concisely states the rule of pleading applicable to the case at bar in the following language:

“It is urged in support of the indictment that it is generally sufficient to describe the offense substantially in the language of the statute. This is undoubtedly the general rule, but, as has been said, such rule simply means, ‘that when the statute defines or describes the acts which shall constitute a particular offense, it is sufficient in an indictment to describe those acts in the language employed in the statute, applying them, of course, concretely to the person charged.’ (People vs. Ward, 110 Cal., 369, 372.) In such cases, the statutory description gives to the accused sufficient notice of the charge against him. In the vast majority of cases the statute declaring the public offense does so define or describe the acts constituting it, but in many cases it does not, and to these

cases is applicable the qualification to the general rule described by Mr. Justice Harlan in *United States vs. Simmons*, 96 U. S., 360, [page 18] as a qualification 'fundamental in the law of criminal procedure, that the accused must be apprised by the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense, and plead judgment as a bar to any subsequent prosecution for the same offense.' Our Penal Code provides that the indictment or information must contain 'a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended' (Sec. 905, Subd. 2); that it must be direct and certain as regards 'the particular circumstances of the offense charged, when they are necessary to constitute a complete offense' (Sec. 952, Subd. 3); and that it is sufficient if, among other things, the act charged as the offense is set forth 'in such a manner as to enable a person of common understanding to know what is intended.' These provisions but recognize the principle universally recognized in civilized countries, that one accused of crime shall be allowed to know the charge against him, so that he may have an opportunity to present his defense thereto, if any he has. (See *People vs. Palmer*, 53 Cal., 615; *People vs. Ward*, 110 Cal., 369.)"

This decision is cited and approved in *People vs. Butler*, 35 Cal. App., 357, in which the suffi-

ciency of another indictment which attempted to charge a violation of Section 72 of the Penal Code is under consideration. If the court will examine those portions of the indictment in the Butler [page 19] case which are quoted in the opinion, it will be seen that the Butler indictment in comparison with the one in the case at bar is almost a model pleading. Notwithstanding this, it was held to be insufficient upon the ground that the offense created by that section could not be charged in the language of the statute, but that the circumstances of the offense must be set out. Another recent case strongly in point is *U. S. vs. Bopp*, 230 Fed., 723. In that case the defendants had been indicted for conspiring to begin and set on foot certain military enterprises to be carried on within the territory and jurisdiction of the United States against the territory and Dominion of the King of Great Britain, a foreign prince with whom the United States was at peace. The indictment alleged that the end, aim and purpose of said military enterprise was, among other things, to blow up certain railway tunnels in the Dominion of Canada, and to destroy and sink by force of arms, all ships with their cargoes and crews engaged in transporting munitions of war for Great Britain and her allies. The indictment was held to be insufficient. In the course of the opinion Judge Dooling says:

“Neither this statute nor any other declares what is meant therein by the words [page 20] ‘military enterprise,’ nor what would be required to constitute such an enterprise, so that in giving effect to the statute

the court must determine from other sources what Congress meant when it used these words. So far as the conspiracy itself which is charged in this indictment is concerned, it is stated in the language of the statute without amplification; that is to say, there is no statement that defendants conspired to do certain things, which, if accomplished, would in the judgment of the pleader constitute the beginning or setting on foot or the preparing or providing means for a military enterprise, and upon the sufficiency of which things to constitute such offense the judgment of the court might be exercised.

“It is a settled rule of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same terms as in the definition; but it must state the species, it must descend to particulars, or as stated in *United States vs. Carll*, 105 U. S., 611, 26 L. Ed., 1135:

“‘In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity set forth all the elements necessary to constitute the offense intended to be punished.’

“The sole charge against the defendants here is that they conspired ‘to begin and set on foot, and prepare and provide the means [page 21] for certain military enterprises.’ This is the bald language of the statute; the

mere conclusion of the pleader. But the particular things which they conspired to do are not stated—the things which, if in fact accomplished, would constitute the setting on foot or providing means for a military enterprise. What does the pleader understand the words ‘military enterprise’ to mean? What in his judgment constitutes a military enterprise? The indictment gives neither the defendants nor the court any information in this regard, and the things that the pleader might regard as sufficient to warrant him in asserting that defendants conspired to set on foot or provide means for a military enterprise might in the judgment of the court fall far short of being the things intended by the statute. The language of the Supreme Court in *United States vs. Hess*, 124 U. S., 486, 8 Sup. Ct., 573, 31 L. Ed., 516, seems to me peculiarly applicable to the present case:

“ ‘The statute upon which the indictment is founded only described the general nature of the offense prohibited; and the indictment, in repeating its language, without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to a jury.’

“ ‘The defendants are entitled to know the particular things which they are charged with having conspired to do, and the court, when the indictment is challenged, must also have this information, in order to be able definitely to say whether a conspiracy to do such particular things is a conspiracy to set [page 22] on foot or provide means for a

military enterprise. The indictment here is not aided by the averments therein that the intention of defendants and the purpose of the enterprise was to destroy tunnels, railroads, bridges, trains and ships which were engaged in the transportation of munitions of war. Such destruction is not necessarily aimed at the territory or dominions of the king of Great Britian, but might be directed only against the various companies owning such tunnels, railroads, bridges, trains and ships. And while such destruction might well be the aim of a military enterprise, it is not necessarily so, nor can it be said that everyone who might undertake so to destroy or cripple railroads or ships was engaged in such an enterprise, even though munitions of war were transported, by them. It is not even averred that the purpose of destroying the railroads and ships was to prevent the transportation of munitions of war, and the words 'railroads or ships which were engaged in transporting munitions of war,' without further averment, might well be mere words of description, having no relation to the motives of the defendant, and certainly not being sufficient to stamp every attempt to destroy such roads or ships as a military enterprise."

Perhaps the best statement of the rule applicable to charging statutory offenses in the language of the statute is found in *People vs. Perales*, 141 Cal., 581:

[Page 23] "While it is the general rule that it is sufficient to charge an offense in the language of the statute, yet this rule is subject to the qualification, that where a more particular statement of facts is necessary in order to charge the offense definitely and certainly, it must be made. The statute may, and often does, define the offense by the use of precise and technical words which have a well-recognized meaning, or designates and specifies particular acts or means whereby an offense may be committed.

"Under such circumstances, to charge the offense substantially in the language of the statute will be sufficient.

"When, however, the words or terms used in the statute have no technical or precise meaning, which of themselves imply the offense, or where the particular facts or acts which shall constitute it are not specified, but, from the general language used, many things may be done which may constitute an offense, it is then necessary, in charging an offense claimed to be embraced within the general language of the statute, to set forth the particular things or acts charged to have been done, with reasonable certainty and distinctness, so that the court may determine whether an offense within the statute is charged, or one over which it has jurisdiction, and so that the defendant may be advised of the particular nature of it, in order to defend against it, and to plead in bar a judgment of conviction or acquittal thereof, if subsequently prosecuted."

[Page 24] The language of the late Justice Lorigan, in the case last above quoted is cited with approval in *People vs. Silva*, 8 Cal. App., 349 (see also *People vs. Martin*, 52 Cal., 201).

Another case strongly in point, is *People vs. Pierro*, 17 Cal. App., 741. The defendant in that case was prosecuted under the provisions of the juvenile court law for having committed acts of a lewd and lascivious character, with an alleged dependent child. Otherwise expressed, the offense of contributing to the dependency of a minor under the age of 18 years, was the crime intended to be charged by the information. It is held in the opinion of the District Court of Appeal that the general allegation in the information that the child therein named was then and there a dependent child, was insufficient to inform the defendant of the particulars of the charge which he was called upon to meet. We quote from the language used by the court:

“The defendant, by demurrer, objected to the insufficiency of this information on the ground that the particular acts or conduct chargeable against Valita Rhinehart by reason of which the child became a delinquent were not set out in the information, and that therefore defendant was not informed of the particulars of the charge he was called upon to meet. In our opinion, there was merit [page 25] in this objection and the demurrer to the information should have been sustained. The child, if dependent, may have become a vagrant, or a beggar, she may have become incorrigible or destitute; she may

have frequented the company of criminals, or become an inmate of a house of prostitution; or deported herself in many other ways by reason of which the character of a dependent child may have become affixed to her within the meaning of the juvenile court law. Defendant was entitled to have the information show the particulars in this regard, for he was called upon to meet the issue, first, as to whether the child had in fact become a delinquent. If she had not, the charge of contributing to the cause of such delinquency of the child or its continuance, could not be made out against him. Merely charging that the child was a delinquent within the meaning of the juvenile court law, as the district attorney did charge, when the statute enumerates many and different acts by reason of which a child may become a delinquent, cannot be said to satisfy the requirement of section 952, Penal Code, which provides that an indictment or information must be direct and certain, as it regards '3. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense.' "

We further respectfully call the attention of the court to the following authorities:

- I. *Wharton's Crim. Proc.* (Kerr's Ed.)
Secs. 269, 270;
[Page 26] *Sykes vs. State*, 66 Ala., 70;
Grattan vs. State, 71 Ala., 344;
Bates vs. State, 31 Ind., 72;

State vs. Windell, 60 Ind., 300;
State vs. Flint, 33 La. Ann., 1288;
State vs. Simmons, 73 N. C., 269;
State vs. Meschac, 30 Tex., 518;
State vs. Higgins, 53 Vt., 191;
Commonwealth vs. Chase, 125 Mass., 202;
U. S. vs. Ballard, 118 Fed., 757;
Haynes vs. U. S., 101 Fed., 718;
State vs. Halsted, 39 N. J. L., 402;
State vs. Kentner, 178 Mo., 487;
Collier vs. Commonwealth, 110 Ky., 516;
 62 S. W., 4.

In concluding this portion of our argument, we most respectfully urge to the court that the overruling of the demurrer in this case by the trial court was not a mere technical error. It deprived the defendant of a substantial right,—the right to be sufficiently informed of the nature of the accusation against her, to enable her to prepare her defense. The defendant and her counsel went into the trial of this case without the slightest knowledge as to what alleged acts of the defendant the District Attorney would rely upon for her conviction. Not only were these uncertainties and insufficiencies of the information raised [page 27] by demurrer, but defendant's counsel in an effort to ascertain what his client was charged with and what he must be prepared to meet and disprove, moved the court for an order to compel the District Attorney to furnish him with a bill of particulars—a procedure sanctioned by the practice of the federal courts. This motion as appears from the clerk's transcript, was denied by the trial judge.

Both before and during the trial, defendant's counsel sought, without success, for information as to what their client was actually charged with. Under the information as drawn, the District Attorney might have proved that the defendant had organized or become a member of any society or assemblage that the mind could conceive, and then proceeded to introduce evidence as to the character, belief and doctrines of such organization. If the information in this case is held to be sufficient, we say, with the utmost sincerity, that criminal pleading might as well be abolished.

Tested by every known rule covering the sufficiency of indictments and informations as laid down by the learned text writers and by the decisions of the highest courts of this and every other state, and by the federal courts as well, the information in the case at bar is clearly insufficient to sustain a conviction. It would have been insufficient even in the absence of a demurrer. The reports are full of cases where indictments and informations which describe the offense attempted to be charged with a far greater degree of certainty, have been held bad. We know of no rule of law and are aware of no decision upholding such a pleading as the information in question. For this reason alone, the judgment should be reversed.

II. The Evidence was Insufficient to Justify the Verdict.

(Omitted as immaterial.)

[Page 39] *However radical or contrary to prevailing opinion the views of an individual or society may be, mere opinion cannot be punished as a crime.* Conspiracy to violate the law may be criminal, but to seek to change the law by peace-[page 40] able means,—by the ballot or by political action,—cannot be punishable. And yet this, according to the admission of the District Attorney himself, is what the defendant was in favor of doing, and we challenge the Attorney General to point out to the court any evidence in the record which by any reasonable inference tends to show that the organization which she joined advocated the commission of any crime or the violation of any law.

The right of every citizen under the Constitution and fundamental laws of this land to freedom of conscience and freedom of speech, and to advocate changes both political and economic, is well expressed in the language used by Justice Kerrigan of this court, while sitting on the supreme bench, in the case of In re Hartman (Crim. 2300, decided March 13, 1920):

“Nothing would seem to be more certain than that the inhabitants of the United States have both individually and collectively the right to advocate peaceable changes in our Constitution, laws or form of government, although such changes may be based upon theories or principles of government antagonistic to those which now serve as their basis.”

The charge in the count in the indictment on which the defendant was convicted is that she did unlawfully, wilfully, wrongfully, deliberately and [page 41] feloniously organize, and assist in organizing, and was, is and knowingly became a member of an organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism. The proofs do not show that she ever organized or became a member of any such organization. There is nothing either in the platform of the Communist Labor Party adopted at the Oakland meeting hereinabove referred to, or in the platform or program of the Communist Labor Party of the United States (People's Exhibit 5—Rep. Trans., pages 411-439) which either expressly or by implication advocates the violation of any law or the use of force or violence in bringing about political or industrial changes. There is no evidence of any combination or conspiracy, by the Communist Labor Party or among any of the members thereof, to commit any crime, to inaugurate terrorism, or to use unlawful measures in bringing about their desired ends. For this total failure of proof the judgment of conviction should be reversed.

III. Prejudicial Error in the Admission of Evidence.

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 (Omitted as immaterial.)
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[Page 61] **The Conviction a Miscarriage of Justice.**

We have presented briefly, but we believe with sufficient detail, the issues involved upon this appeal. The defendant was tried and convicted, not for any act of her own, but because other persons, with whom she was not shown to have had the [page 62] slightest dealings, started fires and carried poison in other parts of the State, because irresponsible fanatics sang doggerel verses set to Methodist tunes, and because a French Nihilist wrote a book dealing with matters and things so preposterous that its author should have been brought before a lunacy commission. We do not wish to be guilty of levity, in arguing a cause which involves the liberty of an innocent woman, but where it appears from the record as it does in this case that the police of one of the larger cities of this State raided the house of a law-abiding citizen, suspected of holding radical views, and, among other things, confiscated a copy of the English Bible,—then it seems to us that language fails to properly characterize the absurdity of this prosecution from its very inception. Where a District Attorney is allowed to convict a defendant residing in this State of the offense denounced by this statute by reading from the writings of foreign fanatics, we say in all seriousness, that he might as well have been permitted to have read to the jury from the Book of Judges or the Book of Kings, and to have taxed the defendant with responsibility for the assassination of Uriah or the judicial murder of Naboth. The evidence in this case, insofar as it relates to the defendant herself, fails utterly to prove that

she ever in word, thought or deed violated or [page 63] intended to violate any law upon the statute books or do the slightest injury to the persons or property of others. The information upon which she was convicted does not charge any crime known to the law. When this court has examined, as it must examine, the entire case including the evidence, we believe that it will say that in this judgment of conviction there has been a miscarriage of justice.

It is respectfully submitted that the judgment should be reversed.

Dated, San Francisco, July 21, 1920.

J. E. PEMBERTON,
NATHAN C. COGHLAN,
Attorneys for Appellant.

WILLIAM F. HERRON,
of Counsel.

Exhibit B.

IN THE
DISTRICT COURT OF APPEAL OF THE
STATE OF CALIFORNIA

IN AND FOR THE FIRST APPELLATE DISTRICT,
Division One.

Criminal No. 907.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

VS.

CHARLOTTE A. WHITNEY,
Defendant and Appellant.

APPELLANT'S CLOSING BRIEF.

Preliminary Statement.

* * * * *

(Omitted as immaterial.)

* * * * *

[Page 2] An analysis of the 998 pages of testimony taken at her trial does not disclose one word even purporting to show—

That she ever committed an act of violence;
 That she ever aided or abetted violence;
 That she ever advised violence;
 That she ever uttered a violent sentiment;
 That she ever knew of any act of violence offered by any organization or individual belonging to any organization;

Or even that the organization in which she admits membership ever committed any act of violence.

On the contrary, the record indicates that Charlotte Anita Whitney was opposed to all violence and held convictions against it as strongly as those held by people of the Quaker faith, whose religious scruples are respected and not made the basis for sneers and prosecution.

It is not alleged nor suggested that Charlotte Anita Whitney was ever a member of the Industrial Workers of the World or of the Bolsheviks of Russia. There is not one scrap of evidence even remotely suggesting that she ever endorsed any act of violence either by these organizations or by individuals belonging to these organizations. Yet appellant believes that no intelligent human being can review the record of her trial and not be forced to believe that a conviction was secured [page 3] by inflaming the minds of the jurors with the idea that she was in some degree responsible for and sympathetic with the atrocious crimes committed either by these organizations or members thereof.

It is respectfully urged that never in the history of California was there a plainer miscarriage of justice.

Never in the history of California was a defendant before a court of justice so ruthlessly deprived of vital rights guaranteed under the Constitution.

Never was there a more apparent indecent haste to appease public wrath by the offering up of a vicarious sacrifice.

The time has now arrived in the free United States of America when, even if inadvertently, you should join a political party which expresses sympathy with a political change any place on earth, you are a criminal syndicalist and liable to serve a sentence of fourteen years in the penitentiary. It seems incredible that this should be true, but the facts in the Whitney case prove conclusively that this is the exact fact.

An analysis of the prosecution's case and of respondent's brief demonstrates conclusively that when it was found impossible to prove that in any degree Charlotte Anita Whitney had ever advocated violence or taught violence, when it was found that her entire life was a denial of violence and that her personality was the antithesis of violence, when it was found impossible to prove that the Communist Labor Party, of which she was a member, had been involved in any violence, resort was had to the introduction of testimony as to acts committed by criminals belonging to the Industrial Workers of the World and acts committed by the Bolshevist regime in Russia.

Not only was Charlotte Anita Whitney not a member of the I. W. W. organization or of the Bolshevist party of Russia, but there is not one [page 4] shred of testimony even remotely suggesting that she ever sympathized in any degree with any of the excesses committed by any indi-

viduals belonging to any of these organizations or by these organizations as such.

In attempting to justify the deluging of the jury in the trial of Charlotte Anita Whitney with testimony as to crimes committed and advocated by the Bolsheviks of Russia, thousands of miles distant, and of crimes committed by members of the I. W. W. organization two and three years prior to the trial of Charlotte Anita Whitney, counsel for respondent argues that the court instructed the jury that defendant was not to be charged with responsibility for acts done outside of her presence.

The transcript of testimony shows that conservatively speaking, sixty per cent. of the testimony taken had reference to the Bolsheviks of Russia or the acts of I. W. Ws.

To assert that this testimony did not arouse in the jury an unjust prejudice against the defendant after the jury had witnessed the admission of this testimony as pertinent, competent and relevant, and after the jury had listened to this testimony hour after hour and day after day, is to deny the obvious.

If it were simply desired to show the character of the Bolshevik regime in Russia and of the I. W. W. organization, and if it were not the determination of the prosecution to inflame the mind of the jury unjustly against Charlotte Anita Whitney, what further testimony was necessary, admitting for the sake of argument that it was relevant and competent, than the manifestoes of the Bolshevik party and the printed propaganda of the I. W. Ws.

The record shows conclusively that the prosecution was in possession of thousands of circulars by the introduction of any one of which it [page 5] could have proved the character of Bolshevism or I. W. Wism. Yet for days we find witnesses paraded before the jury, testifying to crimes committed in remote places without the knowledge of Charlotte Anita Whitney, and without any suggestion that she had any knowledge of the crimes or what the party of which she was a member had any knowledge of the crimes testified to.

It is apparent from respondent's brief that the weakness of the proof against this defendant was such as to require conclusions not warranted by the premises on which they are based.

On page 3 of respondent's brief we find the following:

"But on the contrary, counsel for appellant concede her intellectual powers and admit that she is learned in political and economic questions. In view of this the defendant *must* have been very familiar with the history, principles, tactics and acts of other revolutionary organizations and movements which were endorsed by the very organization, the California Communist Labor Party, of which she became a member."

A calm and judicial review of this startling sentence should serve to enlighten the court regarding the manner in which conclusions were jumped at in the prosecution of this defendant.

From the fact that Charlotte Anita Whitney was learned in political and economic questions,

the conclusion is drawn that she must have been very familiar with the history, principles, tactics, etc., of revolutionary organizations and movements.

We are enlightened regarding the necessity for this violent logic when we recall the fact that in 998 pages of testimony there is not one single word to prove or to suggest that Charlotte Anita Whitney either directly or indirectly ever had any knowledge of any revolutionary movement, and particularly is the record bare of an iota of evidence to prove that Charlotte Anita Whitney [page 6] had any knowledge whatever of any crime committed either by the Bolshevist Party of Russia or the I. W. Ws.

The necessity for the violent logic in respondent's brief, however, is further made plain when we realize that the burden was upon the prosecution to establish that Charlotte Anita Whitney *knowingly* was a party to the organization of a group committed to criminal syndicalism.

It seems apparent that having been unable to produce at the extraordinary trial accorded to Charlotte Anita Whitney any evidence to show any knowledge on her part of any revolutionary movement, the fatal missing link in the state's proof is supplied by the extraordinary logic of counsel on page 3, of respondent's brief.

Fair and Impartial Trial.

• • • • •

(Omitted as immaterial.)

• • • • •

[Page 16] It also tends to an understanding of respondent's brief to bear in mind the following, from page 7:

"In other words, all the good of the French revolution proceeded not from violence and mob action, but through the orderly processes of law and legislation."

By inference we may deduce that the violence of the American revolutionary army in attacking the British was a most reprehensible mistake, and that the thirteen colonies should have proceeded through the orderly processes of law and legislation to redress their wrongs.

Sepiently, counsel for the respondent proceeds:

"The foregoing suggests the reason for the enactment of the criminal syndicalism act as well as its spirit and purpose."

[Page 17] We can only conclude that the American revolutionists were wrong and that the whole spirit of freedom of political thought and liberty for which that contest was waged was a mistake.

If it were not for the fact that through the autocratic abuse of administrative power in the United States during the last four years, the rights of American citizens to freedom of thought and freedom of action have been reduced to a shred of those which they formerly enjoyed, it would be hard to understand how such assertions could be seriously made in a document presented to a court of justice in the United States of America.

Under the circumstances, however, respondent's brief is enlightening in showing how far we have drifted from the fundamental concepts of the rights of American citizens.

There is no question that the criminal syndicalism law, insofar as it is aimed at the cowardly and brutal crimes committed in secret in connection with industrial warfare, has accomplished good, but insofar as it has been utilized as an engine of tyranny to deprive American citizens of freedom of political thought and speech, it is a replica of the alien and sedition laws enacted in America, in the latter part of the eighteenth century, which were so hateful in the eyes of the American people that they wrecked the political party responsible for their enactment.

In respect to the instant case, we wish earnestly to direct the attention of the court to the vital distinction between the case of Charlotte Anita Whitney and the cases of *People vs. Malley*, 33 Cal. App. Dec., 346, and *People vs. Taylor*, 34 Cal. App. Dec., 414.

[Page 18] In each of these cases it was shown that the defendant was not only a member of the Communist Labor Party but had been or still was a member of the I. W. Ws.; that in each case the defendant was active in the distribution of literature and the spreading of the propaganda of this organization.

In the case of Charlotte Anita Whitney, there is no allegation that either now or at any time in the past she was ever a member of the I. W. Ws. or of the Bolshevik Party of Russia, or that she at any time ever distributed any literature of these organizations or that at any time she ever

expressed any sympathy with acts of violence committed by these organizations.

In the case of Charlotte Anita Whitney the sum total of her offense consists in the fact that she was present at the organization meeting of and joined a political party known as the Communist Labor Party, and that she participated in some of the deliberations of some of the committees of that party during a party convention.

It is admitted that she acted as a member of the credentials committee and that she also acted as a member of a committee which adopted a resolution advocating amnesty for political and class war prisoners.

In other words, in so far as this record shows, Charlotte Anita Whitney is sentenced to serve fourteen years in San Quentin prison because in broad daylight she walked into a public convention hall in the City of Oakland, there joined a political party, acted as a member of the credentials committee, and was a member of a committee which adopted a resolution advocating amnesty for political and class war prisoners.

[Page 19] *Constitutionality of Criminal Syndicalism Act.*

Conscious of the fact that in passing on an application for a writ of prohibition the Supreme Court of the State of California has rendered an opinion stating—"We see no merit in the claim that the act under which petitioner is being prosecuted is invalid as being in violation of the federal and state constitution"; and also conscious of the fact that this honorable court has by im-

plication upheld the constitutionality of the act by reference to the case of *People vs. Moilen*, 167 N. W. (Minn.), 343, 348, appellant respectfully urges that a thorough review of all of the aspects of this question will sustain the contention of unconstitutionality as to a portion of the California Act, and will demonstrate conclusively the vital distinction between the criminal syndicalism act of the State of Minnesota and the criminal syndicalism law enacted by the State of California.

Appellant respectfully urges that the criminal syndicalism law of the State of California, as it stands, is violative of the 14th Amendment of the Constitution of the United States.

The case of the State vs. Moilen cannot be taken as conclusive in relation to the California statute because of a vital difference in the language employed in the two statutes.

The Minnesota statute prohibits the advocacy of crime, etc., "*as a means of accomplishing industrial or political ends.*"

The criminal syndicalism act of California punishes violence or unlawful methods of terrorism, etc., "*as a means of accomplishing a change in industrial ownership or control or effecting any political change.*"

In other words, the Minnesota statute provides a penalty for the commission of any act of violence or the teaching or aiding or abetting of any act [page 20] of violence designed to effect any political end. It would apply with equal vigor to the person who would employ methods of terrorism or of violence, for instance, to prevent a chance on the prohibition law, and to the person who

would use such methods to bring about a change in the prohibition law.

The Minnesota statute would punish the corrupt holder of a political office who would seek by methods of terrorism and violence to prevent his being ousted lawfully from office, and at the same time would punish the aspirant for political office who would resort to means of terrorism or violence to bring about the desired political end.

In other words, the Minnesota statute does not discriminate between classes of persons, but is general in its application and is in accord with the Constitution.

The Minnesota statute with equal force applies to those engaged in industrial controversies. It would punish the person who would seek by violence and terrorism to prevent a change in industrial control, as well as the persons who by those methods sought to accomplish a change.

The criminal syndicalism law of California expressly refers only to those who seek by violence or methods of terrorism to accomplish a change in industrial ownership or control, or to effect a political change.

Under the California law the corrupt holder of political office might with impunity organize a group to maintain itself in office by violence or terrorism and escape any penalty under the criminal syndicalism law, while the person desiring to oust such corrupt regime would be guilty of criminal syndicalism and liable to punishment.

[Page 21] The proponents of prohibition might organize to control by methods of terrorism elections to the legislature and not be guilty of criminal syndicalism, while the opponents of prohibi-

tion at the same election using the same methods would be.

The opponents of city and county consolidation in the City of Oakland and County of Alameda, could without regard to the criminal syndicalism law organize by violence to defeat the measure on this subject shortly to be submitted to the voters of that locality. The proponents of city and county consolidation however would be liable to fourteen years' imprisonment for the same offense.

The present owners of industries in California might practice violence to prevent the application of new laws providing for control of industries by the Railroad Commission of the State of California and not be guilty of criminal syndicalism.

Illustrations might be multiplied indefinitely to accentuate the discriminatory character of the law.

No doctrine has been more explicitly or frequently promulgated by the courts of the United States than the doctrine which holds that classifications in legislation to avoid violating the equality clause of the Constitution must be reasonable and not arbitrary.

It seems impossible to conceive a more arbitrary classification than that which permits one person or group to prevent a change while making it criminal for the opposing person or group to accomplish the change.

12 C. J., 1133:

“Statutes passed in the interest of the public health, safety or morals, are void as class

legislation wherever they are made to apply arbitrarily only to certain persons or classes of persons, or to make an unreasonable discrimination between persons or classes." Citing cases.

[Page 22] 12 C. J., 1141:

"But on the other hand a penal statute which makes arbitrary distinctions between different persons or classes of persons, either by making certain acts criminal offenses when committed by some persons but not when committed by others * * * has been declared unconstitutional as class legislation." Citing cases.

12 C. J., 1175:

"A statute or ordinance is void as a denial of the equal protection of the laws which makes a particular act a crime when committed by a person of one race but not when committed by a person of another race."

12 C. J., 1186:

"A legislation is void as contravening the equal protection guaranty which makes an act a crime when committed by one person but not so when committed by another in a like situation" (citing cases), "or which makes the question as to whether a certain act is criminal or not depend on an arbitrary or unreasonable distinction between persons or classes of persons committing it" (citing

cases), "within these rules statutes or ordinances have been sustained which have made it a criminal offense * * * to incite to the unlawful destruction of property." Citing cases.

12 C. J., 1187:

"A statute is void as a denial of the equal protection of the laws which prescribes different punishments or different degrees of punishment for the same acts committed under the same circumstances by persons in a like situation." Citing cases.

Re Ah Fong, Fed. Cases 102 (3 Sawy., 144):

"The equal protection of the laws under the 14th Amendment, implies not only equal accessibility to the courts for the prevention or the redress of wrongs and the enforcement of rights, but equal exemption with others of the same class of all charges and burdens of every kind."

Ho Ah Kow vs. Noonan, Fed. Cases 6546 (5 Sawy., 552):

"The equality of protection assured by the 14th Amendment implies that no charges or burdens shall be laid upon one person which are not equally borne by others, and that in the administration of federal justice one person shall suffer for his offenses no

greater or different punishment than another."

In re Tiburcio Parrot (C. C.), 1 Federal, 481, 1 Ky. L. R., 136:

"Discriminating legislation by a state against any class of persons or against persons of any particular race or nation in what- [page 23] ever form it may be expressed, deprives such class of persons, or persons of such particular race or nation, of the equal protection of the laws and is prohibited by the 14th Amendment to the Constitution of the United States."

State vs. Williams, 32 S. C., 123, 10 S. E., 876:

"General statutes 2084 which makes the violation of a contract between land owner and a laborer indictable and fixes the limit of punishment in the case of the landowner but imposes no limitation in the case of the laborer, is unconstitutional as making a discrimination in the punishment which may be imposed."

Peonage Cases, 123 Fed., 671:

"Act of Alabama, Mar. 1, 1901, makes it a penal offense for any person who has contracted in writing to labor for another for any given time * * * and who shall afterwards without the consent of the other party and without sufficient excuse, to be adjudged

by the court to 'leave such other party * * * and take employment of a similar nature from other persons without giving him notice of the prior contract.' "

"Another statute subjects the new employer to penalties if he employs such person with knowledge of the prior contract. Held, such statute is unconstitutional as class legislation, subjecting laborers to penalties for breach of contract which are not imposed on any other class of citizens. Statute also denies to class of citizens affected the equal protection of the laws."

Re Langford, 57 Fed., 570:

"The act involved required knowledge on the part of the person charged that intoxicating liquor was intended for sale; subdivision 2 made it a criminal offense for any servant of a special class of common carriers to remove from a car any intoxicating liquor whatever, without any qualification as to knowledge that it was intoxicating liquor and without attaching any liability to the person receiving the liquor from the carrier. Held, subdivision 2 discriminated in singling out one class from the whole community for punishment. The South Carolina constitution provided that 'No person shall be liable to any other punishment for any offense, or be subjected in law to any other restraints or disqualifications in regard to any person rights, than such as are laid on others under like circumstances.' "

Horwich vs. Walker Gordon Laboratory
Co., 68 N. E., 938:

"Act prohibiting sale and use of cans, boxes, bottles, etc., bearing the registered mark of the owner without his consent is in contravention of the Constitution, Art. IV, [page 24] par. 22, prohibiting special legislation, as it gives the owners of the property of the class named rights not enjoyed by owners of other classes of personal property."

"The act also provided that the possession of such articles by junk dealers was prima facie evidence of unlawful possession. Held, unconstitutional, as it authorized conviction of such dealers on evidence that would not warrant the conviction of other persons."

The analogy here, is that the joining of a society advocating crime to bring about a political change is a violation of the criminal syndicalism law, while the joining of a similar society for the purpose of preventing a political change is not a violation of the law.

Re Opinions of Justices, 207 Mass., 601,
94 N. E., 558, 34 L. R. A. N. S., 604.

"Rendering proprietor of a Chinese restaurant criminally liable for permitting women under the age of twenty-one years to enter it or be served with food and drink there, deprives him of his liberty and property without due process of law and deprives him of the equal protection of the laws. Po-

lice power does not extend to exclusion of young women from restaurants kept by Chinese, since such a regulation has no direct relation to the evil to be remedied."

The above is from the syllabus. The following is the last paragraph of the opinion:

"The fact that a man is white, or black, or yellow, is not a just and constitutional ground for making certain conduct a crime in him when it is treated as presumably an innocent act in a person of a different color."

American Sugar Refining Co. vs. McFarland, 229 Fed., 284:

"Act of Louisiana, par. 10, of 1915, regulating the business of refining sugar, provides that any person engaged in the business of refining sugar within the state, who shall systematically pay in Louisiana a less price for sugar than he pays in any other state, shall be prima facie presumed to be a party to a monopoly or combination in restraint of trade or commerce and upon conviction thereof subject to a fine of \$500 a day for the period during which he is adjudged to have done so, and that the business of refining sugar within the meaning of that act is thereby defined to be that of any concern that buys or refines raw or other sugar exclusively, or that re-[page 25] fines raw or other sugar taken on toll, or that buys or refines more raw or other sugar than the aggregate of the sugar pro-

duced by it from the cane grown and purchased by it. Held, that the discrimination between the sugar refiners to which it applies and buyers of sugar not engaged in refining or refiners of sugar not engaged in refining in Louisiana, or not buying or refining more sugar than that produced from cane grown and purchased by them, or not buying sugar in any other state, is such a denial of the equal protection of the laws to the refiner to which it applies as to render the statute invalid and unenforceable, as it makes the fact of ones ownership of property in Louisiana the test of criminality, *and makes an arbitrary selection of the parties who shall be subjected to its penal provisions*, without regard to any difference between their delinquency and that of others."

The following is taken from the opinion:

"Unless the legislature may arbitrarily select one corporation or one class of corporations, *one individual or one class of individuals*, and visit a penalty upon them which is not imposed upon others *guilty of a like delinquency*, this statute cannot be sustained. * * * Arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this." Citing *Gulf of Colorado and Santa Fe R. R. vs. Ellis*, 165 U. S., 150, 159, 17 Supreme Ct., 255, 258, 41 L. E., 666.

Re Mallon, 16 Ida., 737, 22 L. R. A. N. S., 1123:

"Sec. 6452 Revised Codes, in fixing the punishment of a person who escapes from a state's prison at the same term for which he is serving at the time of the escape denies equal protection of the law to persons under like circumstances, and, in providing that the escape of a state prisoner is made a crime and exempting federal prisoners and others who may be confined in the penitentiary for temporary purposes, is special and discriminatory legislation and violates the 14th Amendment to the Constitution of the United States and the Constitution of Idaho."

Miller vs. Sincere, et al, 112 N. E., 664:

"While the legislature has a wide discretion in determining what shall be considered a crime and the classification of crimes, discriminations of criminal statutes applying to certain persons or classes must be based on valid, and not upon mere arbitrary classification in favor of certain individuals or corporations."

Commonwealth vs. International Harvester Co. of America, 115 S. W., 755:

"A statute which, when construed according to the canons of statutory construction, *confers a right on one class of citizens to do* [page 26] *an act made a criminal offense*, when done by one other class, conflicts with the 14th Amendment of the Federal Constitution."

State vs. Latham, 98 Atl. (Me.), 578:

“If legislative regulations differ as to localities, classes and conditions, the classifications must be reasonable, and based upon a real and not arbitrary difference in conditions.

“Revised Statute Chapt. 136, par. 12, requiring milk dealers to pay for purchases semi-monthly, and providing for punishment by fine on default in payment, is unconstitutional as violating Constitutional Amendment No. 14, as to class legislation and is not justifiable under the police power as being for the protection of public health.”

The above is from the syllabus.

The following is from the opinion:

“Diversity in legislation to meet diversities in conditions is permissible. But if legislative regulations for different localities, classes and conditions differ, in order to be valid, these differentiations or classifications must be reasonable and based upon real differences in the situation, conditions or tendencies of things. Arbitrary classification of such matters is forbidden by the Constitution. If there be no real difference between the localities or business or occupation or property, the state cannot make one in order to favor some person over others.” Citing a large number of cases.

“This statute does not apply to all classes of debtors, but to one class. It does not apply to all debts incurred by purchase of products, but to one class of debts. * * * *It subjects a class of debtors to liability of crim-*

inal prosecution to which other classes of debtors are not subject."

Re Van Horn, 70 Atl., 986, from the opinion:

" 'Equal protection of the laws' must certainly mean equal security or burden, under the laws, to everyone similarly situated. A statute to escape condemnation as infringing the rights guaranteed by this amendment (14, United States Constitution) must bear alike upon all individuals and classes and districts that are similarly situated, in a similar manner, and with uniformity. Otherwise, there would be unjust discrimination which this constitutional mandate prohibits. The purposes of the constitutional amendment must have been to prevent that which was arbitrary and capricious and to require uniformity and equality under like conditions. The so-called police power of the legislature which enables it to make regulations and restrictions to protect the health, morals, [page 27] safety or welfare of the general public; and its determination will rarely, if ever, be interfered with by the courts. But this does not justify a legislative enactment which discriminates when there is no basis for discrimination. *Wherever an enactment has attempted to make that a crime in one place which by all the laws of reason must be a crime elsewhere within the same jurisdiction*, such attempted distinction is found by the courts to be illusory and the act is held unconstitutional."

State vs. Divine, 98 N. E., 776.
 Birmingham Water Works Co. vs. State,
 48 So., 658:

"The sum of these provisions is that no burden can be imposed on one class of persons, natural or artificial, which is not in like conditions imposed on all other classes."
 Citing cases.

Sterret Packing Co. vs. Portland, 74
 Ore., 390, 154 Pac., 410:

"An ordinance providing for the inspection of meats and slaughter houses located without the city as a condition precedent to the sale of products within the city, but exempting slaughter houses and placing plants subject to federal inspection laws, is invalid in so far as it prescribes higher inspection regulations than those fixed by federal rules."

State vs. LeBaron (Wyo.), 162 Pac., 265:

"Act limiting hours of labor for females is unconstitutional so far as applying to restaurants as class legislation under the constitution of the United States, amendment No. 14, because applying to all hotels and restaurants except 'those operated by railroad companies,' the distinction being arbitrary and unreasonable."

American Digest, decennial edition, Vol.
 4, Constitutional Law, page 1752.

State vs. Sanders, 82 N. W., 445, 111 Iowa,
1, 53 L. R. A., 763, 82 Am. 88. Rep.,
489.

"Where there are two concerns engaged in precisely the same business and both conducting it in precisely the same manner, a statute which would undertake to impose a liability on the one and not on the other could not be sustained in the face of either our state or federal Constitution." *Sams vs. St. Louis & N. R. R. Co.*, 174 Mo., 52, 73 S. W., 686, 61 L. R. A., 475.

"It is not competent for the legislature to give our class of citizens legal exemption from liability for wrongs not granted to others; and it is not competent to authorize any person, natural or artificial, to do wrong to others without answering fully for the wrong." *Park vs. Detroit Free Press Co.*, 40 N. W., 731, 72 Mich., 500, 1 L. R. A., 500, 26 Am. 88. Rep., 544.

[Page 28] "A valid classification for legislative purposes must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any just basis. It must be grounded upon a reason of a public nature, and the act must affect all who are within the reason for its enactment." *Judgment (C. C.)*, 128 F., 474, reversed. *Kane vs. Erie R. Co.*, 133 F., 681, 67 C. C. A., 655, 68 L. R. A., 788.

Statute Vague.

Again the statute is open to constitutional objection on the ground that its terms are vague and not susceptible of definition.

Respondent argues that because the Communist Labor Party of Oakland endorsed the platform of the National Communist Labor Party, and the National Communist Labor Party endorsed Bolshevism, it was therefore permissible to introduce in evidence manifestoes of the Bolshevik Party of Russia to show the character of the Communist Labor Party of Oakland (page 49).

This being true, then it would be the duty of the District Attorney of Alameda County immediately to cause the arrest and prosecution as a criminal syndicalist of every person who joined the Friends of Irish Freedom. It would be proper to introduce in evidence the resolutions of this organization endorsing the struggle of the Irish people for liberty. It would then be proper to introduce in evidence the manifestoes of De Valera and the Irish Republican Government, forbidding Irishmen to pay taxes to England, and to combat English military forces with violence. Thus the Friends of Irish Freedom in Oakland would be proved to have endorsed violence in the accomplishing of political change and would be criminal syndicalists.

But appellant will freely predict to this honorable Court that it will never be called upon to sustain or reverse the conviction of a Friend of Irish [page 29] Freedom as a criminal syndicalist. The reasons for our confident prediction need not be

expatiated upon. Everyone knows that if this absurd provision of the criminal syndicalism law were enforced or attempted to be enforced against those sympathizing with the struggles of Ireland against butchery and tyranny, the entire law would be blotted out of the statutes at a special session of the legislature if the lawmaking body did not happen to be convened in regular session.

Conclusion.

The political features of the criminal syndicalism law of the State of California today, it is respectfully urged, *are not only unconstitutional but repugnant to every American ideal of freedom of thought and freedom of speech.*

It is respectfully submitted that the judgment of the trial Court should be reversed.

Respectfully submitted,

NATHAN C. COGHLAN,
J. E. PEMBERTON,
JOHN FRANCIS NEYLAN,
Attorneys for Defendant and Appellant.

Dated, April 8th, 1921.

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Exhibit C.

IN THE

DISTRICT COURT OF APPEAL OF THE
STATE OF CALIFORNIA,

IN AND FOR THE FIRST APPELLATE DISTRICT,

Division One.

Crim. No.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

CHARLOTTE A. WHITNEY,
Defendant and Appellant.

SUPPLEMENTAL BRIEF FOR APPELLANT.

Since the writing of the opening brief for the appellant in this cause, a decision has been handed down by this Court which in certain particulars discusses and passes upon one of the contentions which we raised in our opening brief, and renders it desirable, therefore, that we file a supplemental

brief, to present our views of the decision referred to and its applicability to the case at bar. The decision to which we have reference is

People vs. Malley, 33 Cal. App. Dec., 346, decided on Oct. 18th of this year. We assume that the Malley case will be cited by the Attorney-General as upholding the sufficiency of an indictment based upon the same statute as that in the case at bar, and accordingly we deem it of importance to discuss at some length the scope and effect of that important and far-reaching decision. We take this procedure for the additional reason that we believe, with the highest respect to this Court, that the opinion in the Malley case is justly subject to criticism upon grounds which may not be urged by counsel in that cause upon a petition for a rehearing or upon a petition for a hearing in the Supreme Court. It is our purpose in this [page 2] memorandum to show, *First*, that this Court erred in holding that the indictment in People vs. Malley was sufficient and, *Second*, that in any event the Malley case is not authority in the case at bar for the reason that the information in this cause is deficient in important particulars in which the Malley indictment was not. We also propose herein to raise a federal, constitutional question.

Criticism of the opinion of this Court in People vs. Malley.

We believe, and most respectfully urge, that the question of the sufficiency of the indictment in People vs. Malley was erroneously decided by this Court. We further submit that the decision therein is not only contrary to the overwhelming weight of authority, but that it overturns the most fundamental and universally established rules of criminal pleading relating to statutory offenses. The charging portion of the indictment in the Malley case avers that the defendant did "wilfully, unlawfully and feloniously circulate and publicly display, certain books, papers, pamphlets, documents and other printed and written matter, then and there in the possession, custody and under the control of him, the said James P. Malley, containing and carrying written advocacy, teaching and advising the commission of crime, sabotage, and other wilful and malicious damage and injury to property, and unlawful acts of force and violence, and unlawful method of terrorism as a means of accomplishing a change in industrial ownership and control, and effecting political changes."

The Court, after calling attention to the fact that the indictment substantially follows the [page 3] language of the statute, goes on to say:

"To hold that the indictment does not state a public offense, would be to say that the statute defines none, for as we shall presently

show the former follows and employs almost the precise language of certain sections of the act. The language of the statute and of the indictment being the same, the latter must be understood in the same sense as the former. (People vs. White, 34 Cal., 183, 186.)”

This seems to us an extremely novel statement of the law, to say the least, and the fallacy of the statement is easily susceptible of demonstration. There are many penal statutes which define and punish offenses and which do not contain and cannot in their very nature contain a statement of the acts constituting such offenses, for the reason that the offense may be committed by a great variety of acts. In such cases it would certainly be inaccurate to say that the statute defines no offense, and yet no lawyer would pretend for a moment that an indictment which merely followed the language of the statute would be sufficient. Let us take two or three illustrations.

There is a penal statute in this state which makes it a crime to obtain the money or property of another by false or fraudulent pretenses. Who would say that such a statute defines no offense? Yet who, on the other hand, would contend for one moment that the crime therein denounced could be charged in the language of the statute? To hold that it did would be to set at nought the decisions of every court of last resort from Maine to California.

There is a statute making it a crime to receive stolen property, knowing the same to have been stolen. Of course the statute defines an offense,

and yet who would seriously urge that a mere charge in the language of the statute which did [page 4] not set forth the fact that the property had been stolen, or by whom, or describe the property with reasonable certainty, would be sufficient?

It is a crime under the law of this state to falsely testify to any material matter in any proceeding or action in which an oath may be administered. Of course the statute defines, and defines sufficiently the crime of perjury. Yet who would contend for a moment that an indictment for perjury which merely followed the language of the statute, was sufficient?

The penal code of this state (sec. 470) also provides that "every person who with intent to defraud * * * falsely makes, forges or counterfeits any charter, letter-patent, deed, lease, indenture, writing-obligatory, etc.," naming a great number of written instruments, is guilty of forgery. Clearly the statute defines the offense, yet what lawyer of the slightest experience or knowledge of criminal pleading would seriously contend that an indictment which merely charged what "A forged, altered and counterfeited a certain deed" would be sufficient? Yet there is no reason why any of these confessedly insufficient indictments cannot be upheld, if an offense under the criminal syndicalism statute may be charged in the naked statutory language. With equal appropriateness might an appellate tribunal quote (as does this Court in the Malley case) the language of *People vs. King*, 27 Cal., 507: "If the defendant is guilty he stands in need of no information to be derived from the perusal of the indictment as to the means

used by him in committing the act, or the manner in which it was done, for as to both his own knowledge is quite as reliable as statements contained in the indictment. If he is not guilty, the information could not aid in the preparation of his defense."

[Page 5] Such reasoning, we say with all respect, is reminiscent of that used in one of Bernard Shaw's wittiest plays by a western sheriff conducting the informal trial of a suspected horse-thief, who overrules the defendant's notion for a change of venue on the grounds of local prejudice with the statement that if the defendant did not wish to be tried by a local jury he should steal his horses in another county. It is a sufficient answer to say that such is not the law as it has come down to us from time immemorial, and as it has been declared by every court of last resort in every state of our country and in every land in which the substantive and adjective law are based upon the common law of England. Furthermore the Supreme Court of this state did not in the King case use the language above quoted as a statement of a general rule of law. The language was employed with reference to the sufficiency of an indictment for murder, an indictment which was far more specific than the practice in this state requires, though not as specific as such an indictment at common law. It certainly was not employed in a general sense, for if such be the law, what need is there of any indictment at all? If the defendant is guilty, he knows what he did without being told; if innocent, he knows that he did nothing wrong, and an indictment cannot aid him in the preparation

of his defense. To judges and lawyers such arguments need no refutation. *The framers of the constitution, following the tradition as old as the Magna Charta, have provided that in all criminal prosecutions the accused is entitled to be informed of the nature and cause of the accusation against him. And the courts of this, and every English-speaking land have established from time immemorial the rule that where a statute uses generic terms and words which do not in and of themselves define the acts constituting the offense, it is not sufficient for an indictment to* [page 6] *pursue the language of the statute, but it must descend to particulars. To this effect, in our opening brief, we cited many authorities from this and other jurisdictions. We can do no better than to quote the language of Justice Field, the great Californian, in U. S. vs. Hess, 124 U. S., 486, 31 L. Ed., 516:*

“Undoubtedly the language of the statute may be used in the general description of an offense; but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.”

To the same effect we see also:

U. S. vs. Crookshank, 92 U. S., 542.

U. S. vs. Summons, 96 U. S., 360.

U. S. vs. Carll, 105 U. S., 611.

U. S. vs. Bopp, 230 Fed., 723.

The California cases which pronounce this rule are cited, exhaustively we believe, in our opening brief.

We contend, therefore, that an indictment under this statute, containing as it does, generic terms and lacking specific definition of the acts constituting the various offenses denounced, cannot be couched in the bare statutory language. What is an unlawful act of force or violence such as the statute prohibits? Such an act might be one of a thousand different things. What is an "unlawful method of terrorism?" How can a Court or how can anyone say, unless informed by the indictment? The pleader's idea of an unlawful act of terrorism might not be the same as that of the Court, and if the pleader is not required to particularize, then the defendant is bound by the [page 7] pleader's conception, and not by the Court's. How can a person of common or uncommon, understanding know what is intended by an indictment which merely uses the general terms employed by this statute. The Court concedes in the Malley case that "a defendant is entitled under any statute, to a clear statement of the offense with which he is charged." How can it be said that such a statement is contained in an indictment which alleges in the bald statutory phrases that the defendant circulated books and pamphlets advocating unlawful acts of force and violence and unlawful methods of terrorism?

II.

The Malley case is not authority in the case at bar.

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(Omitted as immaterial.)

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[Page 9]

III.

The Criminal Syndicalist Law violates the Constitution of the United States.

We desire at this time to raise herein a federal question. We contend that the statute under which appellant was convicted is unconstitutional; that it violates the 14th amendment to the Constitution of the United States in that it abridges privileges and immunities of citizens of the United States. We contend that it is not within the police power of the state to forbid and to punish as a crime membership in any political organization,—and it was for such membership alone that appellant was convicted. It may be conceded that overt acts or declarations designed to overturn the structure of our government by violence or by criminal or unlawful means may be punished as a crime. But mere membership in an organization, without the doing or commission of any overt act is not a crime; it is a constitutional right and privilege; and the legislature cannot otherwise provide. We further contend that the political party of which appellant became

[page 10] a member was not an organization formed for the purpose of bringing about industrial or political changes by unlawful means; that it was an organization which the appellant had a right to join, and that she committed no crime by so doing. By attempting to punish her for the exercise of her legal and constitutional right, the state is abridging the privileges and immunities of a citizen of the United States.

For these reasons, in addition to those advanced in our opening brief we ask that the judgment be reversed.

NATHAN C. COGHLIN,
Attorney for Appellant.

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Office Supreme Court,

FILED

MAR 15 1926

WM. R. STANESBURY

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To be Argued by
WALTER H. POLLAK.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1925—No. ~~10~~ 3

CHARLOTTE ANITA WHITNEY,
Plaintiff-in-Error,

against

THE PEOPLE OF THE STATE OF
CALIFORNIA,
Defendant-in-Error.

Supplementary Brief for Plaintiff-in-Error Showing that Due Process and Equal Protection Provisions of the Fourteenth Amendment to the United States Constitution were Invoked in the California District Court of Appeal and there Denied; Together with Certain Considerations Affecting the Merits.

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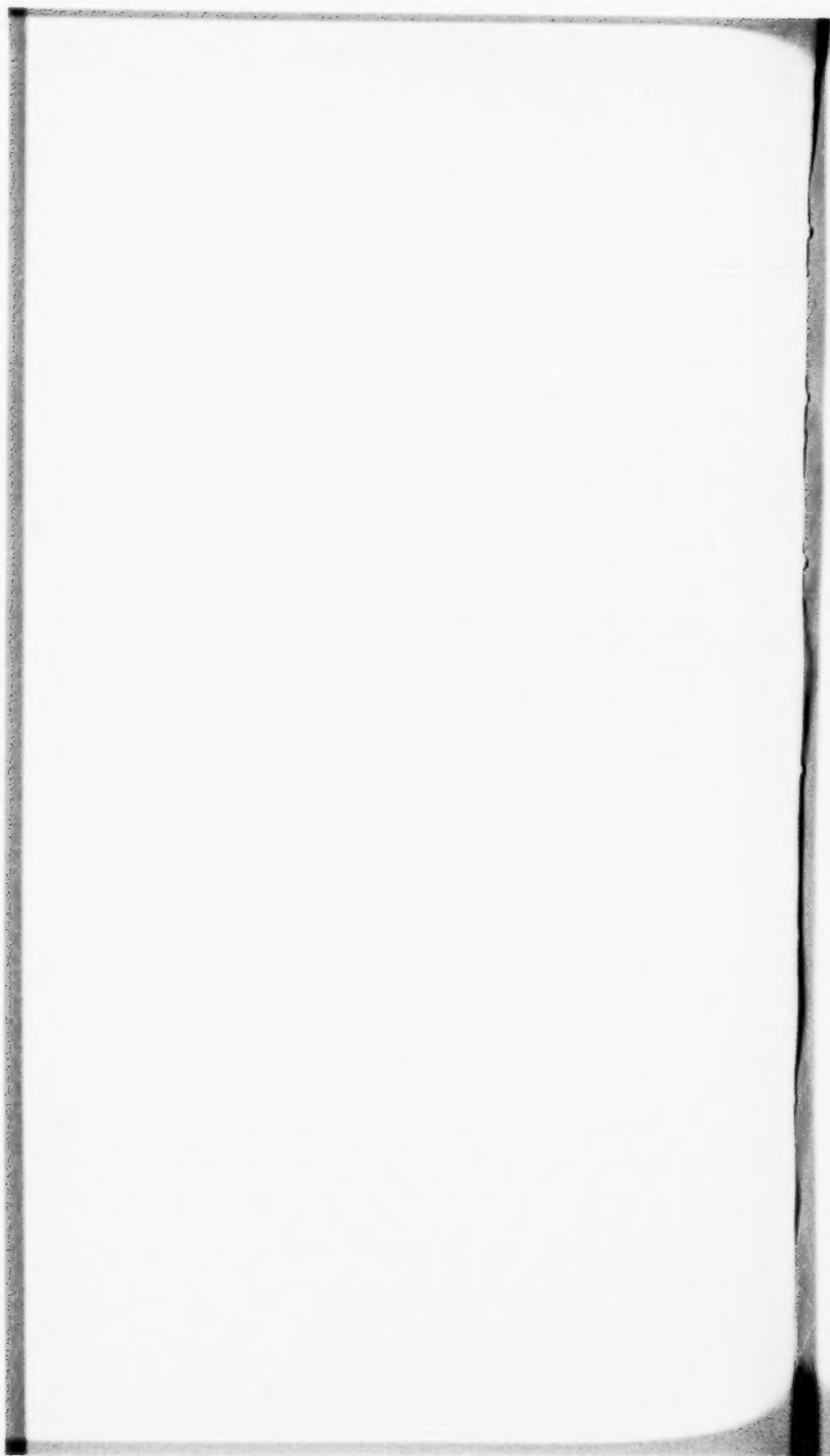
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1925—No. 10.

CHARLOTTE ANITA WHITNEY,
Plaintiff-in-Error,
against

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant-in-Error.

Supplementary Brief for Plaintiff-in-Error Showing that Due Process and Equal Protection Provisions of the Fourteenth Amendment to the United States Constitution were Invoked in the California District Court of Appeal and there Denied; Together with Certain Considerations Affecting the Merits.

This Court upon the first argument dismissed the cause "for want of jurisdiction." Plaintiff-in-Error petitioned for a rehearing, which was granted. The case was set down for a second argument upon the jurisdiction and the merits.

Jurisdiction.

The first purpose of this memorandum is to make clear that plaintiff-in-error pressed upon the California District Court of Appeal—the court of last resort to which appeal ran—contentions based upon the due process and equal protection clauses of the Fourteenth Amendment and that that court denied those contentions:

(1) The relevant documents which have been submitted to this court are the following:

The record, including an addition thereto filed December 16, 1924, and printed as pages 337-339; extracts from the briefs of Miss Whitney's counsel in the California District Court of Appeal printed as an Appendix to our Petition for Re-hearing by this Court; and a copy of the petition for a hearing* by the Supreme Court of California, filed on February 11, 1926, as an addition to the record in this court, by direction of this Court.

This petition for a hearing by the California Supreme Court serves merely to show, in conjunction with the order of the California Supreme Court denying the petition (Record, page 1, fol. 1), that the highest State court refused to review the judgment of the California District Court of Appeal. It has, of course, no bearing on the showing of Federal questions raised in the State court

*By typographical error, the copy of this document filed in this court is described on its cover as a "petition for a re-hearing." No hearing of this cause was of course ever had in the California Supreme Court (see order denying the petition to have the cause heard in that court, Record, page 1), and the petition itself, especially in the opening and closing paragraphs (Addition to Record, pages 1-2, 35), clearly shows its character.

of last resort, which was the District Court of Appeal (*infra*, pages 6-7).

(2) The addition to the record, above mentioned, recites the following order of the California District Court of Appeal:

“It is now ordered that the said remittitur be amended by inserting therein the following statement:

‘The question whether the California Criminal Syndicalism Act (Statutes, 1919, page 281) and its application in this case is repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States, providing that no state shall deprive any person of life, liberty, or property, without due process of law, and that all persons shall be accorded the equal protection of the laws, was considered and passed upon by this Court.’

And the Superior Court of the State of California in and for the County of Alameda is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly” (page 337).

The order is dated December 9, 1924, bears the signature of the Presiding Justice and is certified as correct by the clerk of the court (page 337—Compare as showing that the order is a court order, the order of affirmance by the District Court of Appeal, Record, page 1, fol. 2).

(3) It is settled that a certificate of the State court made part of the record by order of that court is sufficient to establish the raising of the Federal questions below (*Consolidated Turnpike*

Co. vs. Norfolk, etc., Railway, 228 U. S., 596, pages 598-599; *Merchants National Bank vs. Wehrmann*, 202 U. S., 295; *Cincinnati Packet Co. vs. Bay*, 200 U. S., 179, 182). The certificate in the case at bar is in the same form as the certificate in the recent and similar case of *Gitlow vs. New York*. In that case, after the addition of the certificate to the record, the application for a writ of error was referred to the full bench of this court and was granted (260 U. S., 703), and the Court proceeded to review the case upon its merits (268 U. S., 652).

(4) This Court's initial doubt with respect to the jurisdiction may have been based upon the fact that no Federal question is mentioned in the so-called "General Grounds of Appeal to the California District Court of Appeal" (Record, pages 57-9). The explanation is to be found in the principles of California criminal appellate practice. The statement of these general grounds is required only for the purpose of apprising the phonographic reporter "what portions" of his "notes it will be necessary to have transcribed to fairly present the points relied upon" (Record, page 57, see also page 59; see California Penal Code, §1247, California Statutes, 1911, page 692, amending Statutes of 1909, page 1084). Section 1247 of the California Penal Code and the related Section 1246 are attached hereto in an Appendix. An examination of these sections will show that the statement of general grounds of appeal is not directed to the formulation of legal propositions and in no way corresponds to the familiar assignment of errors in the appellate practice of many States and of the Federal courts. It is merely a require-

ment imposed upon the defeated party that "within five days" he inform the reporter which portions of the phonographic notes of *evidence* he thinks it necessary to have transcribed. The only reference to legal contentions is the declaration in the second paragraph of Section 1247 that "all argument of counsel not objected to at the time it was made" is to be "excluded" from the transcript.

The reference to "assignments of error made and passed upon in the State Court" which defendant-in-error quotes (page 4) was not made in a California case, and the phraseology there used would not be appropriate to the California practice.

(5) The failure to refer to Federal questions in the statement of grounds of appeal was therefore under the California practice as inevitable and as irrelevant as a failure to take exceptions in the trial court, as to which see Section 1259 of the California Penal Code:

"Upon an appeal taken by the defendant in open court, the Appellate Court may, without exception having been taken in the trial Court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant." *

*(Cal. Penal Code, §1259 is quoted in full as Appendix C to our main brief, page 93; see also as to charges of the Court, §1176 there quoted.)

Miss Whitney's appeal was taken in open court (Record, pages 29-30).

(6) It is wholly immaterial that the Federal question may not have been raised in the trial court, or rather that it does not appear by the transcript of notes—which in general (see again §1247, Cal. Penal Code) “excludes” argument of counsel—there to have been raised. “It is,” by the express language of Judicial Code, Section 237, enough that the Federal question was raised and necessarily decided by “the highest court of the State in which a decision in the suit could be had” (*Cincinnati Packet Co. vs. Bay*, 200 U. S., 179, page 182; *Chicago R. I., etc., R. R. Co. vs. Perry*, 259 U. S., 548, 551 and cases cited).

(7) The California District Court of Appeal for the First Appellate District, became in this case “the highest court” of California “in which a decision in this suit could be had” when the California Supreme Court by its order of June 24, 1922 (Record, page 1), denied defendant's petition to have her cause heard in that court. This order of the Supreme Court of California is in exactly the same form as the order of that court in the case of *Mulcrevy vs. San Francisco* (231 U. S., 669, see page 672), in which case Mr. Justice McKenna, writing for this court, unmistakably declared that such an order was a refusal to review and not an affirmance, and that writ of error from this court should have been directed not to the California Supreme Court but to the California District Court of Appeal. The result in the *Mulcrevy* case was a necessary deduc-

tion from the rule announced in *Norfolk Turnpike Co. vs. Virginia* (225 U. S., 264, page 269), that this court would construe the refusal of the highest court of a State to review a cause as a refusal to take jurisdiction and not as an affirmance,*

“unless it plainly appears on the face of the record, *by affirmance in express terms of the judgment or decree sought to be reviewed*, that the refusal of the court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits.” (225 U. S., page 269. Our italics.)

*The quality of the ruling by the Supreme Court of California as a refusal to allow an appeal and not as an affirmance, is conclusively shown by Article VI, Section 2 of the California Constitution which requires in the case of every actual “determination” by that court that “all decisions of the Court, in Bank or in Department, shall be given in writing, and the grounds of the decision shall be stated.” There is no statement of grounds in the case at bar.

There was no appeal as of right to the California Supreme Court from the determination of the District Court of Appeal (Cal. Constitution, Art. VI, Section 4) so that the case at bar does not present the problem involved in the late decision in *Southern Electric Co. vs. Beha* (Advance Opinions, 1925-6, page 116—December 15, 1925). Appeals as of right in criminal causes are limited to “cases where judgment of death has been rendered.” (See *Treadwell's* Annotated Constitution of California, 5th Edition, 1923, page 38.) The practice here adopted was the practice of applying for a transfer of the cause from the District Court of Appeal to the California Supreme Court after judgment of affirmance in the District Court of Appeal. Such discretionary order may be made by the Supreme Court “within 30 days after such judgment shall become final therein.” That judgment does become final “upon the expiration of thirty days after the same shall have been pronounced,” see *Treadwell*, *ibid.*, page 41. For the dates in the case at bar, see judgment and remittitur of the District Court of Appeal, Record, pages 1-2, and order denying appeal by the Supreme Court, Record, page 1.

To the same effect see,

Merchants Liability Co. vs. Smart, 267
U. S., 126, 127;
Davis vs. L. L. Cohen & Co., 268 U. S.,
638, 639.

(8) In a case like the present it is only by certificate that it is possible to show that Federal questions were raised "in the highest court of the State in which a decision in the suit could be had." For the briefs in the State court are no part of the record here (*Zadig vs. Baldwin*, 166 U. S., 485). The oral arguments in the State court are not preserved. The opinion by the California District Court of Appeal made no reference to the Federal questions—a result, no doubt, induced by the circumstance that the Supreme Court of the State, in overruling an application by Miss Whitney for a writ of prohibition against the prosecution, had said:

"We see no merit in the claim that the act under which petitioner is being prosecuted is invalid as being in violation of the *Federal* and State Constitutions." (*Whitney vs. Superior Court*, 182 Cal., 114—our italics.)

(9) The case was thus the familiar case in which a certificate of the State court, made part of the record, shows that the Federal contentions were urged below and there overruled. This Court, far from rejecting such a certificate, has been careful "to prevent any possible inference that there was any intention to doubt in the

slightest degree the accuracy of the statement contained in the certificate of the presiding judge of the court below" (*Consolidated Turnpike vs. Norfolk, etc., Railway*, supra, 228 U. S. at page 599).

(10) The only possible limitation upon the effect to be given to such a certificate or to any demonstration by the record itself that Federal questions were urged in the State court, is a limitation manifestly inapplicable here. We mean the limitation that if the record—or a concession of plaintiff-in-error (see *Dewey vs. Des Moines*, infra),—affirmatively shows that one clause of the Federal Constitution and one only was relied upon in the State courts, another clause may not be made the basis of argument here (*Keokuk Bridge Co. vs. Illinois*, 175 U. S., 626; *Cox vs. Texas*, 202 U. S., 446, 451-2), or that if only one error constituting a violation of the due process principle is shown by the record to have been urged in the State court, another error, wholly distinct and disconnected, may not be urged here (*Dewey vs. Des Moines*, 173 U. S., 193, 198).

In the case at bar, there is, as we shall see, no shadow of suggestion either in the record or by admission of counsel (compare *Dewey vs. Des Moines*, supra, page 197) that the Federal Constitutional rights to due process and equal protection raised in the District Court of Appeal and denied by that court (see order of District Court of Appeal, page 337), were limited in any way.

(11) Since the record thus shows, in the only way that it could in the circumstances show, that in the California District Court of Appeal plain-

tiff-in-error raised the Federal question of the violation of her rights under the due process and equal protection clauses of the Federal Constitution; since the record also shows conclusively that these questions were not raised too late under the State practice (*Cincinnati Packet Co. vs. Bay*, 200 U. S., 179, page 182), and since the record furthermore shows nothing to limit these Federal questions of due process and equal protection in their widest scope, it is accordingly open to plaintiff-in-error in this court to adduce all possible arguments in support of her claim that the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States were violated by the "California Criminal Syndicalism Act and its application in this case." "Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed" (*Dewey vs. Des Moines*, 173 U. S., 193, at page 198). The parties, indeed, cannot be so restricted, for the oral arguments, as we have remarked, are, in so far as we know, regularly preserved in any jurisdiction.

(12) It happens, however, that in the case at bar, it can be and has been shown that the very arguments addressed by plaintiff-in-error to the California District Court of Appeal in support of these claims of Federal right and there rejected, were to a surprising degree the same arguments we have urged in our main brief in this court. We refer to the appendix to our petition for rehearing, in which we have submitted the relevant parts

of Miss Whitney's briefs in the California District Court of Appeal.

(13) In her closing brief in the California District Court of Appeal (Appendix, Exht. B,* pages xxxii, et seq.) plaintiff-in-error, in support of her claim that the "California Criminal Syndicalism Act and its application in this case," violated the 14th Amendment of the Constitution of the United States (Appendix, page xxxii) in that it denied the equal protection of the laws (Appendix, pages xxxii-xlvi; see especially quotations from the opinions in *American Sugar Refining Company vs. McFarland*, 229 Fed., 284 [pages xl-xli], and *In re Van Horn*, 70 Atl., 986 [page xlv], where the equal protection clause of the 14th Amendment is specifically mentioned), strongly argued that the statute unjustly discriminated between those who opposed and those who favored change in industrial ownership (Appendix, pages xxxii, xxxiii, xxxiv).

Substantially the same argument appears in Point X of our main brief in this court.

(14) In support of her claim that the California Criminal Syndicalism Act and its application in her case deprived her of liberty without due process of law, in violation of the 14th Amendment of the Federal Constitution, plaintiff-in-error argued in the California District Court of Appeal:

*The references in small Roman numerals are to the pages of the Appendix to the petition for re-hearing in the Supreme Court of the United States.

(a) That the statute was void for indefiniteness* (Appendix, Exh. B, pages xlvii-xlviii).

In our principal brief in this court we urged the same argument (Point V, pages 61-65) and as well a closely related argument (Point III, pages 47-51). Since the opinion of the Circuit Court of Appeal (Record, pages 2-4, especially page 4) in terms excluded from the statutory definition of the crime, the element of wrongful intent which might have supplied a definite standard of guilt (*Hygrade Provision Co. vs. Sherman*, 266 U. S., 497, page 501), this related ruling in the State court of last resort was made, in our main brief in this court, the subject of another separate point (Point IV, pages 52-60).

*At page 19 of the closing brief (Appendix, page xxxi) appears the caption "Constitutionality of Criminal Syndicalism Act." On the same page (Appendix, page xxxii) under the heading we have already noted:

"Appellant respectfully urges that the criminal syndicalism law of the State of California, as it stands, is violative of the 14th Amendment of the Constitution of the United States";

there follows a continuous discussion of equal protection (to which we have referred) which ends at the bottom of page xlvi of the Appendix. At the top of page xlvii of the Appendix appears the following caption:

"STATUTE VAGUE. *Again the statute is open to constitutional objection on the ground that its terms are vague and not susceptible of definition.*"

A contention of vagueness definitely connected with the Fourteenth Amendment was of necessity a due process contention (Compare *U. S. vs. Cohen Grocery Co.*, 255 U. S., 81, 89; see also *International Harvester Co. vs. Kentucky*, 234 U. S., 216).

(b) That the statute as applied in her case violated the constitutional rights of free thought, free speech and free assemblage.

This claim was urged in Miss Whitney's opening brief in the California District Court of Appeal (see Appendix, page ii), and it was made unmistakably clear that the "constitutional" rights referred to were Federal rights by the reassertion in the same brief of "the right of every citizen under the Constitution and fundamental laws of *this land* to freedom of conscience and freedom of speech and to advocate changes, both political and economic" (Appendix, page xix). Again in her closing brief in the California District Court of Appeal, emphatic reference was made to the fact that the California Criminal Syndicalism Law "had been utilized as an engine of tyranny to deprive American citizens of freedom of political thought and speech" (Appendix, page xxx).*

The same arguments and arguments closely related are found in our main brief in Points VI, VII, VIII and IX (see pages 66-79).

(15) In the California District Court of Appeal Miss Whitney's counsel repeatedly and explicitly argued (as we have argued in Points I and II of our main brief) that the overruling of the "demurrer" to the information and the denial of

*These claims of Federal right are made still clearer by repeated references to "the fundamental concepts of the rights of American citizens" (Appendix, page xxx) and to "American ideals of freedom of thought and freedom of speech" (Appendix, page xlviii).

a "bill of particulars" together with the general vagueness of the prosecution as to the occasion of the offense "deprived the defendant of a substantial right" (Appendix, page xvii); "the defendant and her counsel went into the trial of this case without the slightest knowledge as to what alleged acts of the defendant the District Attorney would rely upon for her conviction" (ibid., page xvii; see also pages iii-iv, xvii-xviii, xiv, lv). Miss Whitney's counsel urged, indeed, that the denial of the "constitutional right of every accused person 'to be informed of the nature of the accusation against him' " (Appendix, page iv) involved a genuine danger of double-jeopardy (Appendix, page vi, page xiv; compare our principal brief, Point I, pages 36-7; Point II, pages 38-46). Miss Whitney's counsel made these contentions although they could not anticipate the full extent of the injury until the District Court of Appeal itself made matters worse by an opinion which, instead of clarifying the issues, confounded them still further (see our principal brief, pages 19, 21, 35). (That the plaintiff-in-error is not bound to anticipate in the State court the unconstitutional rulings which that Court is going to make, see *Saunders vs. Shaw*, 244 U. S., 317; and to the same effect *Merchants National Bank vs. Wehrmann*, 202 U. S., 295, 299.)

(16) This Court has recognized that even where the record or the concession of plaintiff-in-error's counsel shows—as here it does not show—that a single Federal question only was raised in the court below there would be "no hesitation" in

considering here a "question" which is "only an enlargement" of the question in the State court or which is "so connected with it in substance as to form but another ground or reason for alleging the invalidity" of the ruling attacked below (*Dewey vs. Des Moines*, supra, 173 U. S., 197-8). The lack of definiteness in the prosecution urged in Points I and II of our principal brief here was but the logical outcome of the statute's failure to define the character of the association which it made a crime. The statute carefully avoids a requirement of either knowledge or intent as an element of guilt except in becoming a member. One is guilty who "is or knowingly becomes a member." The information followed the language of the statute. It charged that "at the said County of Alameda, State of California," she "was, is and knowingly became a member." (For quotations from both the statute and the information, see our principal brief, pages 6-7). Was Miss Whitney convicted for attending the Oakland convention or for association with some other assembly or group of the Communist Labor Party; was she convicted of "knowingly" becoming a member of a group whose purposes were forbidden, or of mere presence without knowledge of or assent to such purposes? The record, like the information, leaves both occasion and intent uncertain. The opinion of the District Court of Appeal perpetuated the uncertainty by its reference (Record, pages 3-4) to three different groups—the Oakland local, the Oakland convention, and the Communist Labor Party of California—and by in so many words declaring that

Miss Whitney's "knowledge" and "realization" was "a matter with which this Court can have no concern" (Record, page 4).

(17) The California Attorney General says that plaintiff-in-error has "saved" her "objections to the validity of the *statute* itself, but *not* the unconstitutionality of its *application*" (Defendant-in-error's brief on rehearing, page 2). The distinction is meaningless. "The case must be considered as though the statute, had in specific terms provided for liability upon the precise facts" of Miss Whitney's case (*Cudahy Co. vs. Parramore*, 263 U. S., 418, page 422; see also *Dahnke-Walker Milling Co. vs. Bondurant*, 257 U. S., 282, pages 288, 289). The attempted distinction is not between the question of due process presented by the statute itself and the question of due process presented by the procedure in this case; these questions the attorney general regards as one, for he says (Defendant-in-error's brief on rehearing, page 2) that one of the federal points made in the Court below was that "the act is void for indefiniteness and that *the information in the language thereof is insufficient.*" (Our italics.)

* * * * *

Summarizing and restating the jurisdictional issue we find the situation to be as follows: A certificate of the State court, made part of the record, shows that the Federal Constitutional issues based upon the due process and equal protection clauses of the Fourteenth Amendment were urged in that court and there denied; we know of no case where such a showing, or any

showing, made part of the record has been refused full effect except where the record itself or the concession of plaintiff-in-error demonstrates that only one particular aspect of the Federal right was urged below and wholly disconnected contentions are pressed here; in the case at bar the record shows no such limitation, and there is no concession by counsel for plaintiff-in-error and indeed no contention to this effect, as far as we know, by counsel for defendant-in-error. On the contrary, it affirmatively appears in the case at bar that even the same "arguments," or much the same arguments, were urged below that were urged and will be again urged here. And all this appears, although the oral arguments below are not preserved; although this Court, up to the time when the District Court of Appeal acted, had not recognized that issues of free speech and the like raised a question of Federal right (see *Prudential Insurance Co. vs. Check*, 259 U. S., 530, at page 543, decided almost exactly contemporaneously with the Whitney case in the District Court of Appeal); although the Supreme Court of California in litigation involving the Whitney prosecution had in terms denied that any question of Federal Constitutional right was presented (*Whitney vs. Superior Court*, 182 Cal., 114); although the full infraction of constitutional right involved was not and could not be apparent until the District Court of Appeal affirmed the ruling below, and although the appeal was taken under a practice which calls in so many words for the "exclusion" from the record of the argument of counsel in the trial court.

General Considerations Concerning the Merits.

This is not a case where a defendant, whose own conviction violates no constitutional right, seeks to avoid the penalty properly attached to his act by statute on the ground that the language of the statute is broad enough to include other acts which could not constitutionally be made punishable as crimes. It is to innocent acts which clearly come within the condemnation of the California Criminal Syndicalism Act that the penalty in this case is attached. And it is upon a construction of the statute which emphatically excludes the element of conscious intent from the crime created by this statute that defendant-in-error here takes its stand (Brief for Defendant-in-Error on Rehearing, page 27).

* * * * * * *

It is impossible to affirm without holding either

(1) that intent is not an element of the crime defined by section 2, subdivision 4 of the California Criminal Syndicalism Law—and this is the view of the question which defendant-in-error especially asks this Court to take (Defendant-in-error's brief on rehearing, page 27); or

(2) that an act which is innocent when committed can become criminal by reason of subsequent conduct or subsequently formed intent—a position squarely opposed to the principle that “the criminal intent essential to the commission of a public offense must exist when the act complained of was done” (opinion of Mr. Justice Field, in *U. S. vs. Fox*, 95 U. S., 670, page 671); or

(3) that the mere presence within the county of one who has committed an offense of membership elsewhere is in itself a crime—a position which followed to its logical conclusion would mean that a member of any organization (whether within or without the state) which the Courts of California might hold to be within the condemnation of this act, would in California commit a fresh offense every time he went from one county to another within the state, and thus would make the mere act of crossing the county line a crime.

* * * * *

We again direct the attention of this Court to the difficulty of finding in the record any ground of conviction which comes within the charge set forth in the information, which can be supported by any evidence in the record, and which can be upheld on constitutional grounds.

Was Miss Whitney's presence at the opening of the convention of November 9, the crime for which she was convicted? If that convention ever took on the character of criminal syndicalism, it was not until the end of the convention, and over Miss Whitney's protest. The Attorney General admits (Defendant-in-Error's Brief on Rehearing, page 8) that all that Miss Whitney did in the convention was done before the constitution of the State organization was adopted and that her election as alternative member of the state executive committee had likewise preceded the adoption of a constitution for the state organization. Can mere presence in any assembly, however violent the opinions expressed in that assembly, be a crime?

Was her crime assisting to organize the California Communist Labor Party after the convention of November 9th? The record shows (see our main brief, pages 13, 40-41) no organization meeting in Alameda County which she attended between November 9th and November 28th, the date mentioned in the information. She cannot, therefore, be said to have violated the statute in this way.

Was her crime membership in Local Oakland, the local socialist organization to which she had belonged? This local had not, up to the time of the trial, approved the action of the Oakland Convention (see our main brief, page 41). Without such action it could not have become a part of the organization which resulted from that convention and which received its character from the proceedings at the convention.*

*On page 6 of the defendant-in-error's brief on rehearing, the attorney general states that Local Oakland had before the convention of November 9 "endorsed the Communist Labor Party and had withdrawn from the Socialist Party." It is not noted by the attorney general that the testimony at this point (Record, page 154) made it perfectly clear that Local Oakland was not, up to the date named in the information, a part of the Communist Labor Party because that party had as yet no State organization.

The attorney general states (Brief on rehearing, page 6) that Miss Whitney "held a *membership card* at this time in said Oakland Branch of the Communist Labor Party." The evidence referred to (Record, pages 190-1) is that Miss Whitney took out a card in the "temporary organization," i. e., the organization which had for its purpose the holding of the convention at which the State party was to be formed. The prosecution relies upon the acts of the state convention in adopting the program and platform of the Communist Labor Party of America to give to the state organization the character of a criminal syndicalist organization (see defendant-in-

(Footnote continued on next page.)

Was her crime membership in the state organization which resulted from the convention of November 9th? This was not present in Alameda County any time between November 9th and November 28th. It had no local branch there, as we have said, and it held no meetings there at which Miss Whitney was present. Her mere presence in the County, even if she was a member of that organization, and even if that organization was of a forbidden character, cannot, in itself, have been a crime (supra, page 18).

* * * * *

Defendant-in-error in various parts of its brief points to different occasions and to Miss Whitney's connection with different groups as possible bases for her conviction.

The Attorney General dwells in one place upon her membership in the Oakland Local (Defendant-in-error's brief on rehearing, pages 6, 17).

In another place (Brief on rehearing, page 30) he dwells upon her part in the preliminary preparations for the Oakland Convention, as if the mere adoption of the name "Communist Labor Party" in connection with that convention and the temporary organization for it, had already brought that group within the prohibition of the California Criminal Syndicalism Act. This in spite of the fact shown by the whole history of the

error's brief, pages 9 to 11). Holding a membership card in the preliminary organization, before any specifically unlawful purposes had been adopted by any California group could not, even in the view of the prosecution itself, have been an offense under the statute. On the same page the Attorney General admits that the purpose of the Oakland convention was "to formulate the purpose" of the California Communist Labor Party.

Oakland Convention that the principles and policies of that body remained undetermined until almost the end of the convention, and that the adoption of the program and platform of the Communist Labor Party of America was by no means a foregone conclusion but was arrived at after much dispute and controversy (Record, pages 121, 142).

In another place (Brief on rehearing, pages 15-16, 26) he points to the fact that Miss Whitney did not withdraw from the convention although she could have done so, as if her crime were precisely her failure to register, by walking out of the convention, her disapproval of the adoption of the program and platform of the Communist Labor Party of America.

And still again, the Attorney General mentions (Brief on rehearing, page 14) Miss Whitney's "membership even up to the time of the trial," as "conclusively established by these bold admissions on the witness stand." That admission did not relate to any specific organization, national, state or local, and did not relate to any time other than the time of the trial. Much less was it an admission of any act or association within the County of Alameda on or before November 28, 1919 (Compare information, Record, page 15).

* * * * *

At pages 9 to 11 of defendant-in-error's brief on rehearing, a very few selected passages from the platform and program of the Communist Labor Party of America, which "the California branch" "adopted by reference" are presented as giving the character of criminal syndicalism to

the state organization. At page 11 the clause of the national program and platform referring to the Industrial Workers of the World is featured, with the name of this organization in huge black letters, and with abundance of italics. It is the adoption of this clause "by reference" at the Oakland convention that the prosecution chiefly relies upon (Brief on rehearing, pages 8-11, 24-25).

* * * * *

Miss Whitney's connection with any active measures of criminal syndicalism, was too remote to afford any possible basis of personal guilt. It was at the Chicago convention, a national convention, that this clause recognizing "the effect upon the American Labor movement of the propaganda and example of the Industrial Workers of the World, whose long and valiant struggles and heroic sacrifices in the class-war, have earned the respect and affection of all workers everywhere" was included in the national platform. There is nothing in the record to show that acts of violence on the part of individual I. W. W.s or individual I. W. W. locals in California or elsewhere, were meant to be approved by this expression of class solidarity. There is nothing to show that any such instances of violence on the part of the I. W. W. were before the Chicago Convention of the Communist Labor Party of America or that the recognition of the I. W. W. in that party's platform was intended as an endorsement of these methods. The Oakland Convention adopted, without change, the program and platform of the Chicago Convention. No particular emphasis was laid upon the sentence in the national platform

relating to the I. W. W. There is nothing to show that the Oakland Convention intended the adoption of this platform to be a public expression of approval of any of the objectionable methods of individual I. W. W.s in California. Objectionable I. W. W. methods were not discussed at the Oakland Convention any more than they appear to have been discussed at the National Convention. Still less does the record show that Miss Whitney, who merely sat in the Convention while this resolution as an undistinguished part of the National platform was adopted, regarded this adoption as an endorsement of the violent methods which on certain occasions had been employed by individual members of the I. W. W. in the State of California. Yet it was only by treating the platform adopted by the Chicago Convention and the subsequent adoption of the same platform by the Oakland Convention, while Miss Whitney was present, as an intentional endorsement of the violent methods of individual I. W. W.s in California that a California jury could have found the organization and Miss Whitney as a member to come within the condemnation of the statute.

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A so-called "resolution" presented at the Tenth National convention of the I. W. W. in 1916 (Record, page 225) is printed in defendant-in-error's brief (pages 11-13). It clearly shows on its face that it was not a resolution, but that it was part of the report submitted by "Lambert," who was, so far as the record shows, a local secretary at Sacramento (see Record, page 229). It was ap-

pended to the report of the California "Wheatland Hop Pickers Defence Committee." This is very far from showing an official endorsement of acts of violence committed by I. W. W. members in California by even the national organization of the I. W. W. itself.

* * * * *

Defendant-in-error contends (brief on rehearing, pages 23-24) that the evidence in the record of the "propaganda and example of the I. W. W. and its activities" was introduced for the "sole purpose" (see page 23) of showing the character and purpose of the Communist Labor Party of California, and that the jury's consideration of this evidence was limited to this purpose by an instruction of the Court. But the instruction quoted on page 25 of defendant-in-error's brief, which the Attorney General calls the "limiting" instruction, did not in fact so limit the jury's consideration of this evidence. That instruction left it altogether vague as to whether "the organization of which it is claimed the defendant was a member, or which it is claimed she organized or assisted in organizing" was in fact the I. W. W. or the Communist Labor Party.

* * * * *

Defendant-in-error contends (brief on rehearing, pages 19-21) that the indefiniteness of the indictment was not a lack of due process because on the preliminary examination before the issuance of the information Miss Whitney had learned "what constituted the real substance of the state's case." It was in part precisely because this preliminary examination had dealt only with the con-

vention of November 9th while the information fixed the date of the offense as more than two weeks later that Miss Whitney was unable to know what was the occasion of the offense with which she was charged (see affidavit for bill of particulars, record, pages 61-62).

• • • • • • •

The contention that the endeavor of plaintiff-in-error is "to have this Court weigh the evidence rather than adjudicate the validity of the statute" (Defendant-in-error's brief on rehearing, page 4) shows a misapprehension as to the right of review in this court. The rule that the decision of a State Court upon a question of fact will not ordinarily be reviewed here is subject to "two equally well-settled exceptions; (1) where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it and (2) where a conclusion of law as to a federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts" (*Aetna Life Ins. Co. vs. Dunken*, 266 U. S., 389, page 394, citing *Northern Pacific Ry. Co. vs. North Dakota*, 236 U. S., 585, 593; *Truax vs. Corrigan*, 257 U. S., 312, pages 324-5). This case falls within both these exceptions.

The conviction should be reversed and the plaintiff-in-error discharged.

Dated, March 12, 1926, and respectfully submitted.

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WALTER H. POLLAK,
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On the brief.

APPENDIX.*California Penal Code:*

Sec. 1246. *Papers to be transmitted to Appellate Court. Copy to defendant and District Attorney.* Upon the appeal being taken, the clerk of the court from which the appeal is taken must, without charge, within twenty days thereafter transmit to the Clerk of the Appellate Court a typewritten copy of the following papers:

1. The indictment, information or accusation;
2. A copy of the minutes of the plea;
3. A copy of the minutes of the demurrer;
4. A copy of the demurrer;
5. A copy of the minutes of the trial;
6. A copy of other minutes of the action, including the proceedings on motion for arrest of judgment or new trial;
7. A copy of the written charges given by the Court to the jury, or refused, or modified and given; also a transcript of any oral charge;
8. A copy of the judgment;
9. Any written or printed exhibits offered in evidence at the trial of the cause.

The clerk of the court from which the appeal is taken must also, within the time above specified,

deliver, without charge, to the defendant or his attorney, upon application therefor, a carbon copy of the original transmitted to the Clerk of the Appellate Court; and must also deliver, without charge, a carbon copy to the District Attorney upon his application therefor. (Amendment approved 1909; Stats. 1909, page 1087.)

Sec. 1247. *Settlement of grounds of appeal.* Upon an appeal being taken from any judgment or order of the Superior Court, to the Supreme Court or to a District Court of Appeal, in any criminal action or proceeding where such appeal is allowed by law, the defendant, or the District Attorney when the People appeal, must, within five days, file with the clerk and present an application to the trial Court, stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time, the appeal is wholly ineffectual and shall be deemed dismissed and the judgment or order may be enforced as if no appeal had been taken.

The Court shall, within two days after the filing of such application make an order directing the phonographic reporter who reported the case to transcribe such portion of his notes as in the opinion of the Court may be necessary to fairly and fully present the points relied upon by the appellant. If the Court fails to make the order within two days after the application is filed, the notes requested in the application shall be transcribed

without such order. The phonographic reporter shall, within twenty days after the filing of such application, file with the clerk of the court an original transcription and three carbon copies of the portion of the notes so required to be transcribed, excluding therefrom all argument of counsel not objected to at the time it was made. The same shall be typewritten as prescribed by the rules of the Supreme Court. He shall append to the original and to each copy his original affidavit that is correct. (Amendment approved 1911; Stats. 1911, page 692.)

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No. ~~10~~ 10

Office Supreme

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NOV. 12

WM. R. S.

October Term, 1924.

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLOTTE ANITA WHITNEY,
Plaintiff in Error,

VS.

THE PEOPLE OF THE
STATE OF CALIFORNIA,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION ONE,
STATE OF CALIFORNIA

BRIEF OF DEFENDANT IN ERROR

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CALIFORNIA STATE PRINTING OFFICE

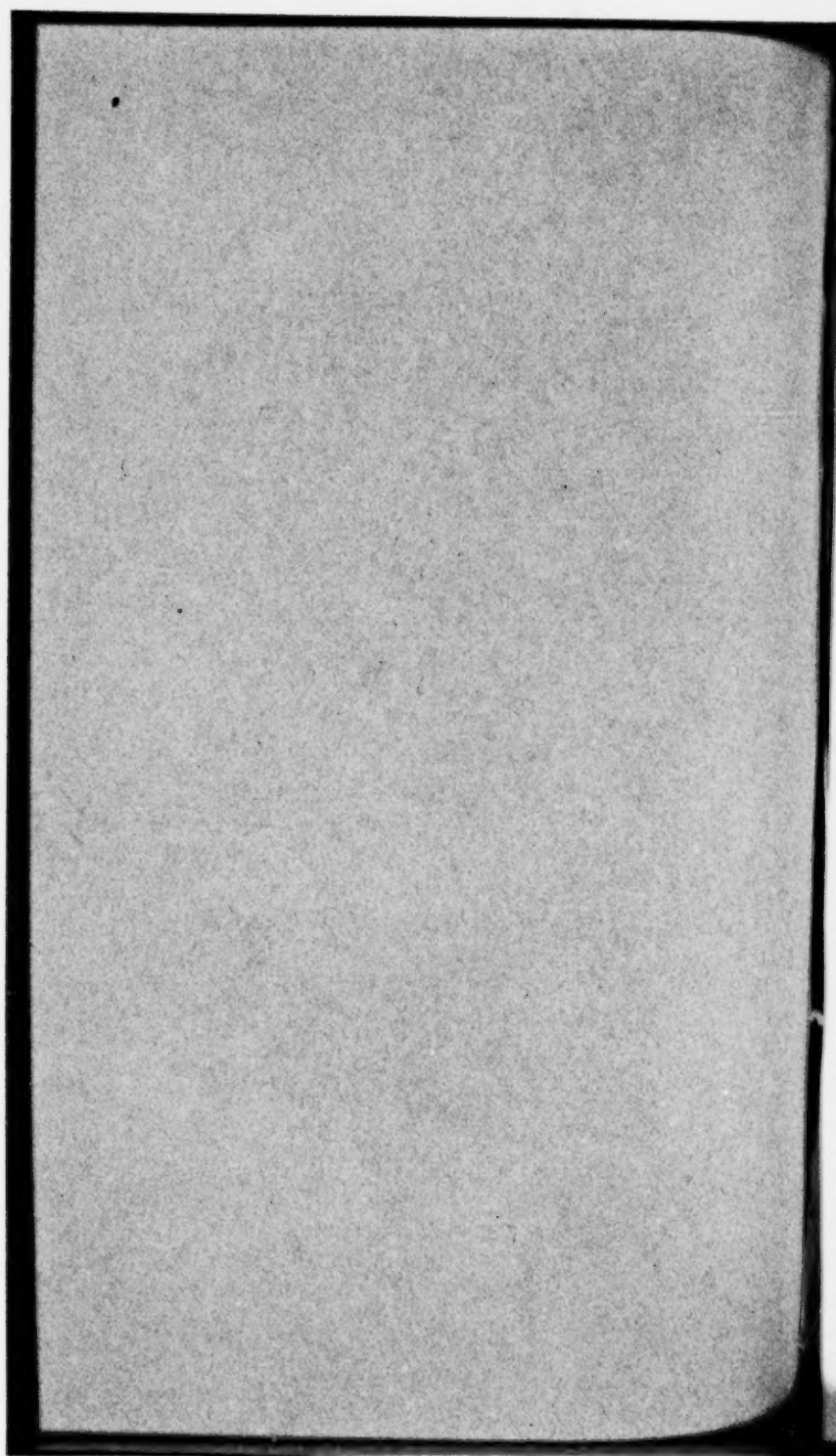


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IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term, 1924.

No. 375.

CHARLOTTE ANITA WHITNEY, <i>Plaintiff in Error,</i> vs. THE PEOPLE OF THE STATE OF CALIFORNIA, <i>Defendant in Error.</i>	}
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BRIEF OF DEFENDANT IN ERROR.

Statement of the Case.

Plaintiff in error was charged by information, filed by the district attorney of the county of Alameda, State of California, with violating the Criminal Syndicalism Act of California (Statutes 1919, page 281) on five separate counts based upon the several subdivisions of said act. The jury found her guilty as charged in the first count, but disagreed as to the others, as to which dismissals were subsequently filed. The first count, and the only one involved in this proceeding, charged plaintiff in error, in the language of the statute, with wrongfully, deliberately and feloniously organizing and

assisting in organizing and knowingly becoming and being a member of an organization and group of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism.

From the judgment of conviction, she appealed to the District Court of Appeal of the State of California, as the result of which her conviction was affirmed.

People vs. Whitney, 57 Cal. App. 449; 207 Pac. 69. (Rec. pp. 2 to 4.)

Thereafter she petitioned to have said cause heard by the Supreme Court of the State of California, which petition was denied by the court, with but two of the seven justices dissenting, and not three as erroneously stated by counsel for plaintiff in error. Incidentally any question that the dissenting justices may have had, could only have been as to the facts, *i. e.*, sufficiency of the evidence, for these same justices theretofore and since have concurred in decisions wherein the constitutionality of the act and the very questions here presented were decided adversely to the contentions of plaintiff in error.

See

In Re McDermott, 180 Cal. 783; 183 Pac. 437;
Whitney vs. Superior Court, 182 Cal. 114; 187
Pac. 12;

People vs. Taylor, 187 Cal. 378; 203 Pac. 85;

People vs. Steelik, 187 Cal. 361; 203 Pac. 78.

Plaintiff in error upon her trial and appeal admitted that she joined the Communist Labor Party

of California, taking an active part in its organization and proceedings, and serving upon its Resolutions Committee. As said in the opinion of the state court in *People vs. Whitney, supra*:

“Upon the main question, however, as to the part which the defendant took in organizing and assisting to organize the Communist Labor Party, there is no dispute. In the brief of the appellant upon this appeal it is stated to be an ‘*admitted fact* that the defendant became a member of the so-called Communist Labor Party, attended a party convention Nov. 9th, 1919, and was *one of the committee on resolutions which reported the platform* herein above set forth.’ In addition to the foregoing admission the evidence abundantly shows that the defendant not only took a leading and active part in the organization of the Oakland branch of the Communist Labor Party of California, but also in the subsequent meetings and acts of said organization.” (Rec. pp. 3 and 4.)

The *constitution* of the COMMUNIST LABOR PARTY OF CALIFORNIA to which she subscribed provides in part as follows:

“Section 1. The name of this organization shall be the Communist Labor Party of California. It shall be *affiliated with the Communist Labor Party of the U. S. of America* and subscribe to its program, platform and constitution. Through this affiliation it shall be *joined with the Communist International at Moscow.*” (Rec. p. 159.)

The conclusion is unescapable that one who merely became a member of the Communist Labor Party of California thereby became affiliated with and subscribed to the constitution of the "Communist Labor Party of America" which, among other things, provides:

"The Communist Labor Party of America declares itself in complete accord with the principles of communism as laid down in the Manifesto of the Third International formed at Moscow. (Rec. p. 172.)

* * * * *

The working class must organize and train itself for the capture of state power. (Rec. p. 172.)

* * * * *

The years of Socialist activity on the political field have brought no increase of power to the workers. Even the million votes piled up by the Socialist Party without any proportionate representation. The Supreme Court, which is the only body in any government in the world with power to review legislation passed by the popular representative assembly, would be able to obstruct the will of the working class, even if Congress registered it, which it does not. The Constitution, framed by the capitalist class for the benefit of the capitalist class, can not be amended in the workers' interest, no matter how large a majority may desire it. * * * (p. 173.)

Not one of the great teachers of scientific Socialism has ever said that it is possible to achieve the Social Revolution by the ballot.

7. However, we do not ignore the value of voting, or of electing candidates to public office—so long as these are of assistance to the workers in their economic struggle. Political campaigns, and the election of public officials, provide opportunities for showing up capitalist democracy, educating the workers to a realization of their class position, and of demonstrating the necessity for the overthrow of the capitalist system. But it must be clearly emphasized that the chance of winning even advanced reforms of the present capitalist system at the polls is extremely remote; and even if it were possible, these reforms would not weaken the capitalist system. (Rec. p. 174.)

In any mention of revolutionary industrial unionism in this country, there must be recognized the immense effect upon the American Labor movement of the *propaganda* and *example* of the INDUSTRIAL WORKERS OF THE WORLD, whose long and *valiant* struggles and *heroic* sacrifices in the class-war have earned the respect and affection of all workers everywhere. We greet the revolutionary industrial proletariat of America, and *pledge them our wholehearted support* and cooperation in their struggles against the capitalist class.” (Rec. p. 176.)

The foregoing demonstrates that plaintiff in error and all others who subscribed to the foregoing thereby strongly endorsed and lauded “the propaganda and example of the Industrial Workers of the World.” That her endorsement was not merely constructive, but active and real, is shown in the evidence to the effect that she was seen at the I. W. W.

headquarters in San Francisco (Rec. p. 274), and also the headquarters of the Defense Committee of the "I. W. W." prisoners at Sacramento. (Rec. pp. 281 and 282.)

As illustrative of the "propaganda and example" which were thus adopted by endorsement, we quote from "People's Exhibit No. 30 * * * 'Sabotage,' by Walker C. Smith."

" 'Sabotage is a mighty force as a revolutionary tactic against the repressive forces of capitalism, whether those repressions be direct or through the State.

" 'It is guerilla warfare,' is another cry against sabotage. Well, what of it? Has not guerilla warfare proven itself to be a useful thing to repel invaders and to make gains for one or the other of the opposing forces? Do not the capitalists use guerilla warfare? Guerilla warfare brings out the courage of individuals, it develops initiative, daring, resoluteness and audacity. Sabotage does the same for its users. It is to the social war what guerillas are to national wars. If it does no more than awaken a portion of the workers from their lethargy it will have been justified. But it will do more than that; it will keep the workers awake and will incite them to do battle with masters. It will give added hope to the militant minority, the few who always bear the brunt of the struggle.

The saboteur is the sharpshooter of the revolution. * * * But he knows that loyalty to the employer means treason to his class. Sabotage is the smokeless power of the social war. It scores a hit, while its source is seldom detected. It is

so universally feared by the employers that they do not even desire that it be condemned for fear slave class may learn still more its great value.' ” (Rec. p. 253.)

The record in this case setting forth the organization of the Communist Labor Party of California in which plaintiff in error participated, and the activities of the so-called I. W. W. in California, whose sabotage and crop destruction were endorsed as aforesaid, is quite voluminous, but it is unnecessary to further discuss the evidence in this case for its sufficiency is not involved in this proceeding, and the brief portions of the record above adverted to have been referred to merely to illustrate the character of the organization of which plaintiff in error was one of the founders, as well as its precepts and purposes.

We shall content ourselves with merely quoting the following summary of the court below :

“As to the knowledge which the defendant had and of her participation in the aims, expressions and activities of the Communist Labor Party of California there can also be no doubt in view of the admitted intelligence of the defendant and of her participation in the drafting of the resolutions and formulation of the constitution of the organization itself. That this defendant did not realize that she was giving herself over to forms and expressions of disloyalty and was, to say the least of it, lending her presence and the influence of her character and position as a woman of refinement and culture to an organization whose

purposes and sympathies savored of treason, is not only past belief but is a matter with which this court can have no concern, since it is one of the conclusive presumptions of our law that a guilty intent is presumed from the deliberate commission of an unlawful act. (C. C. P. Sec. 1962.)”

People vs. Whitney, supra. (Rec. p. 4.)

History and Purposes of the Act.

In construing a statute, the court must, as nearly as possible, place itself in the position of the legislature, and from contemporary facts determine the cause and necessity for the statute, and the evils sought to be remedied, and so interpret it as to suppress the mischief and advance the remedy.

Board of Commissioners vs. Given, 82 N. E. 918; 169 Ind. 468;

Newgirk vs. Black, 174 Ia. 636; 156 N. W. 708;

Washington Term. Co. vs. Dist. of Columbia, 36 App. D. C. 186.

It is unnecessary to discuss at length the history or activities of the *syndicalistic* organizations in this state or elsewhere. As well said in—

People vs. Lesse, 52 Cal. App. 280; 199 Pac 46,

“the purposes of the I. W. W. are a part of the current history of the day—a part of the history of the times. We are informed by the magazines, encyclopedias and dictionaries of the day that the organization advocates criminal syndicalism, revolutionary violence and sabotage.”

In California the I. W. W. first began to make itself felt as a force by its means of sabotage and terrorism, a decade ago. Our judicial history shows that in 1913 two leaders of the I. W. W., Ford and Suhr, fomented a riot among some twenty-three hundred hop pickers in Yuba County, as a result of which the district attorney and a deputy sheriff were slain and two other officers severely injured.

People vs. Ford, 25 Cal. App. 388; 143 Pac. 1075;
People vs. Suhr, 25 Cal. App. 805; 143 Pac. 1088.

Subsequent to the affirmance of the convictions of Ford and Suhr, anonymous demands were sent the Governor of the state, threatening sabotage upon the agricultural properties of the state if they were not liberated from prison. (Rec. p. 231.)

The record in the present case devotes many pages to the activities and tactics used by the said I. W. W., such as the declaration by Lambert, the secretary, that "if it was necessary they would burn up the whole State of California." (Rec. p. 259.) This same person made a written report to the I. W. W. convention that it cost the State of California eight millions of dollars to keep Ford and Suhr in jail. (Rec. p. 231.) The record shows that they used incendiary bombs (Rec. p. 265); burned barns and haystacks (Rec. p. 266); poisoned cattle with cyanide potassium, and put lye in the shoes of men who would not join them (p. 271).

Immediately following the armistice and coincident with the revolution and success of the Red Army in

Russia, further outbreaks occurred as a result of which the Criminal Syndicalism Law was adopted being modeled upon a similar law in Minnesota. Concerning the purpose of this statute, Mr. Justice Waste, in one of the first cases on this subject in this state, declared :

“The design and purpose of the legislature in the enactment of the statute was the suppression of what was deemed by the lawmakers a growing menace to law and order in the state, arising from the practice of sabotage and other unlawful methods of terrorism employed * * * in furtherance of industrial ends and in adjustment of alleged grievances against employers. The facts surrounding the practice of sabotage, and like *in terrorem* methods of self-adjudication of alleged wrongs, are matters of common knowledge and general public notoriety of which the courts will take notice. That they are unlawful and within the restrictive power of the legislature is clear. Sabotage, as practiced by those advocating it as an appropriate and proper method of adjusting labor troubles, embraces, among other lesser offense acts, the willful and intentional injury to or destruction of the property of the employer in retaliation for his failure or refusal to comply with wage or other kindred labor demands. It amounts to malicious mischief and is a crime at common law as well as by statute. * * * It requires no argument to demonstrate that the subject matter of this statute was and is within legislative cognizance, vesting in that body the clear right to prohibit the advocacy or teach-

ing of the iniquitous and unlawful doctrines which it condemns. (*State vs. Moilen*, 140 Minn. 112, 114 (1 A. L. R. 331, 167 N. W. 345, 346).)''

People vs. Malley, 49 Cal. App. 597; 194 Pac. 48.

Questions Involved.

Plaintiff in error makes but two points:

First, that the statute is void for indefiniteness;
and,

Second, that it denies equal protection of the laws.

First Point.

THE STATUTE IS NOT VOID FOR INDEFINITENESS.

A penal statute is sufficiently certain, although it may use general terms, if the offense is so defined as to convey to a person of ordinary intelligence an adequate description of the evil intended to be prohibited.

State vs. Brown, 108 Wash. 205, 182 Pac. 944;

People vs. Carroll, 80 Cal. 153, 22 Pac. 129;

In re O'Shea, 11 Cal. App. 568, 105 Pac. 776;

Smith vs. State (Ind.), 115 N. E. 943;

People vs. Coon, 67 Hun. 523;

State vs. Lawrence (Okla.), 130 Pac. 508;

Evans vs. State, 22 S. W. 18;

Cazarra vs. Dist. of Columbia Medical Suprs.,
25 Cal. App. (D. C.) 443;

Stewart vs. State, 4 Okla. Cr. 564; 109 Pac. 243;

Nash vs. U. S., 229 U. S. 373, supp. 377;

Waters-Pierce Oil Co. vs. Texas, 212 U. S. 86;

Omacchevarria vs. Idaho, 246 U. S. 343;

U. S. vs. U. S. Brewers' Assn., 239 Fed. 163;

Similar Cases.

Criminal syndicalism laws or statutes of the same nature have been held valid in many jurisdictions, and convictions thereunder upheld.

California:

- People vs. Steelik*, 187 Cal. 361; 203 Pac. 78;
People vs. Taylor, 187 Cal. 378; 203 Pac. 85;
In re McDermott, 180 Cal. 783; 183 Pac. 437;
Whitney vs. Superior Court, 182 Cal. 114; 187 Pac. 12;
People vs. Malley, 49 Cal. App. 597; 194 Pac. 48;
People vs. Whitney, 57 Cal. App. 449; 207 Pac. 698;
People vs. Lesse, 52 Cal. App. 280; 199 Pac. 46;
People vs. Wieler, 55 Cal. App. 687; 204 Pac. 410;
People vs. Welton, 211 Pac. 802;
People vs. Casdorf, 212 Pac. 237;
People vs. La Rue, 216 Pac. 627;
People vs. Roe, 209 Pac. 381;
People vs. Sherman, 209 Pac. 1023;
People vs. Sanchez, 206 Pac. 760

Connecticut:

- State vs. Sinchuck*, 115 Atl. 33.

Idaho:

- State vs. Dingman*, 219 Pac. 760.
(Reversed by divided court on evidentiary error.)

Iowa:

- State vs. Tonn*, 191 N. W. 530.

Illinois:

People vs. Lloyd, 136 N. E. 505.

Kansas:

State vs. Berquist, 199 Pac. 101;

State vs. Breen, 205 Pac. 632;

State vs. I. W. W., 214 Pac. 617 (Injunction).

Minnesota:

State vs. Moilen, 167 N. W. 345;

State vs. Workers etc. Pub. Co., 185 N. W. 931.

New York:

People vs. Gitlow, 234 N. Y. 132; 136 N. E. 317;

People vs. Ferguson, 234 N. Y. 159; 136 N. E. 327.

(Not a syndicalism but an anti-anarchy law involved in these cases.)

Oregon:

State vs. Laundry, 103 Ore. 443; 204 Pac. 958;
206 Pac. 290.

(Reversed on procedural error.)

Pennsylvania:

Com. vs. Blankenstein, 81 Pa. Super. Ct. 340.
(Sedition Act.)

Washington:

State vs. Hennessy, 195 Pac. 211;

State vs. Hemhelter, 196 Pac. 581;

State vs. Payne, 200 Pac. 314;

State vs. Kowalchuk, 200 Pac. 333;

State vs. Aspelin, 203 Pac. 964.

That the meaning of this act is clear and definite is apparent from the following analysis thereof made by former Chief Justice Wilbur of the Supreme Court of California in the case of *People vs. Steelik*, 187 Cal. 378; 203 Pac. 78:

“Appellant attacks the constitutionality of the statute because it denounces acts and conduct ‘as a means’ of accomplishing political change or change in industrial ownership, thus leaving to a court or jury to determine whether or not the particular act or conduct of the defendant is adapted to the result denounced by the statute. In considering that question it should be noted that the Criminal Syndicalism Act does not undertake to define the various acts, the advocacy of which is punishable under the statute. Such acts are *already denounced as wrongful under existing laws*. They are (1) the ‘commission of crime,’ (2) ‘wilful and malicious physical damage to physical property,’ (3) ‘unlawful acts of force and violence,’ (4) ‘unlawful methods of terrorism.’ We must look to the general law of the state to determine what are ‘unlawful acts of force and violence,’ and what are ‘unlawful methods of terrorism,’ and to ascertain what acts are crime. The ‘malicious physical damage to physical property’ is evidently synonymous with malicious mischief and arson, and other unlawful acts resulting in the damage to or destruction of physical property. These wrongful acts, most of them already punishable by the criminal law, are denounced by the statute and made felonious when done, or advocated as a means of political or in-

dustrial change. The Criminal Syndicalism Act might be summarized as an act to punish the advocacy of crime or wrong, engaging in conspiracies to commit crime or unlawful acts, or the commission of crime or unlawful acts as a means of changing industrial or political control. It is proper to seek desired changes in political and industrial control, but when criminal or unlawful means are used to effect political control, the means is punishable under the act defining and prohibiting criminal syndicalism, as well as under the act defining the crime. The latter act is no more uncertain than the one denouncing criminal conspiracy as a conspiracy to commit any act 'injurious to the public health' 'or to public morals' or the 'perversion and obstruction of justice' 'or due administration of the laws.' (Sec. 182, Pen. Code.) * * * " (Our italics.)

This same contention is refuted in another California case, *People vs. Wieler*, 55 Cal. App. 687; 204 Pac. 410, as follows:

"In this same connection it is contended that the statute is void for indefiniteness. Counsel rests this objection on the fact that the statute does not define 'crime,' 'unlawful method of terrorism,' 'terrorism,' 'justify,' 'change in industrial ownership or control,' 'political,' etc. If any difficulty arises in the interpretation of the statute, and it becomes necessary to ascertain the meaning of those words, the decisions and code provisions contain numerous passages to assist the courts and there is no constitutional require-

ment that such rules be provided within the bounds of each particular statutory enactment.”

The words “aiding and abetting the commission of crime,” “sabotage” (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), and “unlawful acts of force and violence” have a meaning so clear and definite that no reasonable person can fail to understand the same. That is “unlawful” which is expressly prohibited by law.

The word “sabotage” is expressly defined by the legislature in the act itself, as just seen. The phrase “unlawful methods of terrorism” is clear, and means just what its language imports. It would be difficult, if not impractical, to express this meaning more clearly. It includes any unlawful acts that would have the tendency to strike terror into the hearts of people for the purpose of breaking down their opposition to the proposed political or industrial change. The term “terrorism” is defined as follows:

“The act of terrorizing, or state of being terrorized; a mode of government by terror or intimidation..”

(Webster’s International Dictionary.)

In this connection we desire to compare our California statute on extortion. Section 518 of the Penal Code of California declares: “Extortion is the obtaining of property from another with his consent induced by a wrongful use of force or *fear*, or under

color of official right." Section 519, following, declares: "Fear, such as will constitute extortion, may be induced by a threat, either: 1. To do an unlawful injury to the person or property of the individual threatened, * * *; or, 2. To accuse him, or any relative of his, * * * of any crime; or, 3. To expose, or impute to him or them any deformity or disgrace; or, 4. To expose any secret affecting him or them."

"Terrorism" is but a species of fear. "Fear," it is true, is a very general term, yet everyone knows what it means. The California legislature does not attempt to define the meaning of the word "fear," but confines itself to certain *causes* of fear, or, rather, certain fears which are induced as above stated. Observe the generality of the terms used in the statute above quoted, viz: "unlawful injury to * * * person or property," "any crime," "any deformity or disgrace," and, finally, "any *secret*." These terms are much broader than those found in the syndicalism statute, and yet no one has ever questioned the legal sufficiency of the California extortion law.

Likewise in the state of Washington its criminal syndicalism law was sustained against a similar attack in a very able opinion rendered in

State vs. Hennessy, 195 Pac. 211.

The court there said in part:

"The sixth point is that the statute is void for

indefiniteness. In *State vs. Fox*, 71 Wash. 185, 127 Pac. 1111, *supra*, the same objection was made to the statute there being construed. * * *

In *State vs. Brown*, 108 Wash. 205, 182 Pac. 944, one of the questions was whether the statute which made it a misdemeanor for any person to drive or propel a vehicle upon any public street or highway which without its load should be of such weight as to destroy or permanently injure such street or highway was void for indefiniteness. It was there said:

‘The objection to the statute is that it does not definitely and clearly define the offense intended to be denounced by it. It is argued that a statute to be free from the objection of indefiniteness and uncertainty must be so far specific that a person may know in advance whether his act will or will not be a violation of the statute, and that this statute is not thus specific, since the operator of the vehicle can not know until he actually makes the trial whether the load will or will not permanently injure the highway. In other words, the contention is that a statute, to be free from the objection, that it is indefinite and uncertain, must specifically point out the acts which constitute the crime, not merely prohibit results produced by acts. But such is not the rule. The legislation in creating an offense may define it by a particular description of the acts constituting it, or it may define it as an act which produces, or is reasonably calculated to produce, a certain defined or described result. 16 C. J. 67. If this were not so, it would be easy to find many statutes now upon the books which are open to the objection of

uncertainty, but which have heretofore never been suspected of that fault. As illustrations: the statutes making it an offense to wilfully disturb any religious meeting (Rem. Code, Sec. 2499), any assembly or meeting not unlawful in its character (Id., Sec. 2547), or any school meeting (Id., Sec. 4697), or the legislature, or either house thereof (Id., Sec. 2337), are all statutes which do not specify the particular acts which will constitute the disturbance; yet no case can be found where they have been held invalid for that reason, while there are many which have allowed convictions thereunder to stand. Other illustrations, without specifically enumerating them, can be found in the statutes against malicious mischief, injury to public utilities, injuries to property, the statutes defining and punishing vagrancy, obstructing an officer in the discharge of his duty, publishing articles tending to excite crime, or a breach of the peace, and the like, all of which define the crime by the result it produces rather than by the specific acts constituting the offense.'

The act now before us is no more indefinite than were the statutes which were before the court in those cases; to hold that the syndicalism act is void for indefiniteness would require a modification of the holding in the cases just cited and especially in the *Brown* case. The act is not void for indefiniteness."

A reading of the case just quoted will disclose that it not only cites more than once, but quotes from, and is indeed largely based on the earlier Washington case of

State vs. Fox, 71 Wash. 185; 127 Pac. 1111.

In that case a statute which in the most general and embracing language prohibited the publication of anything that had a "tendency to encourage * * * the commission of *any crime*, breach of the peace * * * or which shall intend to encourage or advocate disrespect to law" was held to be definite and valid.

This brings us to the point that we think is determinative of this case, and that is, that the *Fox* case was taken to this, the United States Supreme Court, which affirmed the decision of the Washington court, in

Fox vs. Washington, 236 U. S. 273.

Mr. Justice Holmes, who delivered the opinion of the court, declared in part as follows:

"This is an information for editing printed matter tending to encourage and advocate disrespect for law contrary to a statute of Washington. The statute is as follows: 'Every person who shall wilfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of *any crime*, breach of the peace or act of violence, or which shall tend to *encourage* or advocate *disrespect for law* or for any court or courts of justice, shall be guilty of a gross misdemeanor'; Rem. and Bal. Code, Sec. 2564.

The defendant demurred on the ground that the act was unconstitutional.

* * * * *

So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed; *United States vs. Delaware & Hudson Co.*, 213 U. S. 366; 407, 408; and it is to be presumed that state laws will be construed in that way by the state courts. We understand the state court by implication at least to have read the statute as confined to encouraging an actual breach of law. Therefore, *the argument that this act is both an unjustifiable restriction of liberty and too vague for a criminal law must fail.* It does not appear and is not likely that the statute will be construed to prevent publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general. In this present case the disrespect for law that was encouraged was disregard of it—an overt breach and technically criminal act. It would be in accord with the usages of English to interpret disrespect as manifested disrespect, as active disregard going beyond the line drawn by the law. That is all that has happened as yet, and we see no reason to believe that the statute will be stretched beyond that point.

If the statute should be construed as going no farther than it is necessary to go in order to bring the defendant within it, there is no trouble with it for want of definiteness. See *Nash vs. United States*, 229 U. S. 373. *International Harvester Co. vs. Kentucky*, 234 U. S. 216. It lays hold of encouragements that, apart from statute, if

directed to a particular person's conduct, generally would make him who uttered them guilty of a misdemeanor if not an accomplice or a principal in the crime encouraged, and deals with the publication of them to a wider and less selected audience. Laws of this description are not unfamiliar. Of course we have nothing to do with the wisdom of the defendant, the prosecution, or the act. All that concerns us is that it can not be said to infringe the constitution of the United States. Judgment affirmed." (*Italics ours.*)

In line with the foregoing decision, it will be noted that the Supreme Court of California in the *Steelik* case above quoted has construed the statute in question as limited to the commission or encouragement of such acts as "are already denounced as wrongful under existing laws." Further along it declares,

"We must look to the general law of the state to determine what are 'unlawful acts of force and violence' and what are 'unlawful methods of terrorism,' and to ascertain what acts are crime."

In a word, the language of the statute, as well as that of the highest court of the state in construing it, shows that the term "criminal syndicalism" is limited to acts which are in themselves *unlawful*. Moreover, the California Supreme Court in considering an ordinance of the city of Los Angeles, in conjunction with the criminal syndicalism law, held the former invalid, because it was not limited to positive acts of unlawfulness, as was the latter; and expressly recognized the right of every person, individually or

collectively, to advocate changes in our form of government by any *peaceable* or lawful means.

“* * * Nothing would seem to be more certain than that the inhabitants of the United States have both individually and collectively the right to advocate peaceable changes in our constitution, laws, or form of government, although such changes may be based upon theories or principles of government antagonistic to those which now serve as their basis. And it seems equally certain that an organization peaceably advocating such changes may adopt a flag or emblem signifying its purpose, and that the display or possession of such flag or emblem, can not be made an unlawful act.”

In Re Hartman, 182 Cal. 447-449.

The foregoing case clearly differentiates the California statute from that of New Mexico, which was held invalid (*People vs. Diamond*, 202 Pacific 988) because it included within its prohibition every peaceful act having for its object a change in government.

Not only is the application of the California syndicalism statute, by judicial construction, confined to acts which are unlawful, but it is likewise limited in other respects. For instance, it has been held that where the charge of criminal syndicalism is based upon subdivisions 1, 2, 3 and 5 of section 2, the acts enumerated in said subdivisions must be pleaded with a degree of particularity that will impart to the accused precise information of the acts with which he is charged, and which, with the evidence adduced,

sustaining such charge, upon conviction, will operate as a bar to another prosecution for the same acts, with the exception that, where the charge is the violation of subdivision 4, as here (becoming a member of a syndicalistic organization), a charge in the language of said subdivision is sufficient.

People vs. Taylor, supra;

People vs. Roe, supra.

It has also been held "that knowledge of the purposes of the organization is an essential element of the crime here charged," and "that honest mistake as to the nature of the purposes of the organization is a good defense."

People vs. Flannagan, 223 Pac. 1014;

People vs. Thornton, 219 Pac. 1020.

Cases Distinguished.

The principal case cited by plaintiff in error on this first point is that of

U. S. vs. Cohen Groc. Co., 41 S. C. 298; 65 L. Ed. 560; 255 U. S. 81.

This case distinguishes itself. The statute there considered was known as the Food Control or Lever Act, providing:

"That it is hereby made unlawful for any person wilfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities, * * *"

Said this court:

"* * * to attempt to enforce the section would

be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest and unreasonable in the estimation of the court and jury."

As illustrative of the vice of such a statute, this court cites, in a footnote to the above decision, a number of cases involving prosecutions under this act, wherein it appears that no two courts gave it the same interpretation, but such demonstration is unnecessary, when it is considered that the adjective "unreasonable" has no limitation of meaning, but is obviously a word of general approximation. The word is subjective in that its meaning depends upon what anyone who reasons thinks about the matter, and as no two intellects function exactly the same, the connotation of the term is conceivably as various as the number of minds considering the matter.

Likewise is the *Lantz* case (90 W. Va. 738) distinguishable, because the statute there had the same vice in that it penalized the operation of automobiles around curves without reducing the speed to a *reasonable* or proper rate.

So too has our California Supreme Court held a provision in a medical practice act prohibiting "grossly improbable statements" in advertising void;

Hewitt vs. Board of Medical Examiners, 148 Cal. 590;

and an information deficient which merely charged that the defendant did “defraud” another.

People vs. McKenna, 81 Cal. 158.

The court in the *Hewitt* case, *supra*, indicated that if the statute had prohibited a “false” statement it would have been sufficient, viz:

“Under this provision the penalty of forfeiture of a physician’s license is not made to depend upon falsity in fact of any matter contained in a statement or knowledge on the part of the physician that it is false, or for the reason that it was intended or had a tendency to deceive the public or to impose upon credulous or ignorant persons, and so be harmful and injurious to public morals, health and safety.”

In the *Todd* (158 U. S. 278), *Brewer* (139 U. S. 228) and *Reese* (92 U. S. 214) cases cited by plaintiff in error we do not find any statute declared void for *indefiniteness*, but merely an abstract statement of principles with which we are in full accord.

In addition to what is said in the cases above quoted, as well as those merely cited, it is manifest that all penal statutes are, and indeed to be constitutional, must be, very general in their terminology. Each embraces a variety of acts or combination of circumstances. Consider the multitudinous methods in which homicide, false pretenses, embezzlement, larceny by trick and device, extortion, etc., may be committed. Observe the generality of statutes defining treason, criminal conspiracy, malicious mischief,

disturbing the peace, and crime against nature. Compared with the "Espionage Act," "Sherman Act," and "Mann Act," the statute of the type here considered is a model of exactitude, and it is significant that no court to this date has appeared to have had any difficulty in determining its *meaning*, whatever may have been the evidential, constitutional, and procedural questions raised and passed on.

The Information.

If, as established by the many foregoing authorities, this statute and similar statutes are constitutional, they do not become invalid by reason of the fact that any indictment or pleading thereunder might happen to be deficient. Therefore, it would appear that that portion of the argument of plaintiff in error which is devoted to a criticism of the sufficiency of the information in this case is outside the question here involved. In passing, it should be said that the same attack on the sufficiency of the information, including most of the cases cited, was made in the state courts both in this case and other cases, with a conclusion adverse to the plaintiff in error.

People vs. Whitney, supra;

People vs. Malley, supra;

People vs. Roe, supra.

It will be seen from the cases just cited that under the construction of the California courts it is necessary that the charges based upon subdivisions 1, 2, 3 and 5 of section 2 of the statute be pleaded with a

degree of particularity that will impart to the accused precise information of the acts with the commission of which he is charged, and where, as here, the charge involved relates solely to a violation of subdivision 4 of said section, in organizing and becoming a member of a group of persons assembled to advocate or aid and abet criminal syndicalism, it is sufficient to charge the crime in the words of the statute. As said in *People vs. Roe, supra* (209 Pac. 381 at 383):

“* * * where the charge is the violation of subdivision 4, the statement in the indictment or information is sufficient if it is in the language of said subdivision, *since the acts therein denounced as acts of criminal syndicalism are sufficiently described by the language itself of said subdivision to make it perfectly clear what was thereby intended.*” (Our italics.)

In other words, charging a person with becoming a member of a syndicalistic organization such as defined in the statute here in question is a direct allegation of a definite fact, for *membership* is a very concrete fact. Thus if anyone in California is charged with *becoming a member* of a syndicalistic organization defined in this statute, he well knows what a charge he is called upon to meet. He knows that the main issue confronting him is whether he *did* or *did not* join an organization of that character. *Joining* is itself an act—an overt act. To charge that a person joined such an organization involves but three issues of fact—first, the joining, second, that

the organization was of the character prohibited by the act, and third, knowledge of its character. It would therefore necessitate pleading the evidence if the state were required, under said subdivision 4 of section 2 of the act to plead, in addition to the fact of joining an organization of the character described in this statute, the further activities of the defendant after he or she became a member as well as the activities of the organization itself.

“Due Process” in California.

In the determination of what constitutes “due process of law” in California, there must also be taken into consideration a notable addition to the constitution of California in the year 1910 in section 4½ of article VI:

“No judgment shall be set aside, or new trial granted in any criminal case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or *for error as to any matter of pleading, or* procedure, unless, after an examination of the entire cause including the evidence, the court shall be of the opinion that the error complained of has resulted in *a miscarriage of justice.*”

This amendment had such a salutary effect upon law enforcement in California, that the people amended the statute in 1914 to include not only criminal but civil and all other cases as well, and this section now reads as above quoted with the word “criminal” deleted. Thus, in determining whether

or not prejudice was suffered by a defendant in a given case by reason of the form of the pleading, the appellate tribunals of this state consider not merely the face of the information itself, but read it in the light of the whole record. So it was that the court, in the case of *People vs. Whitney, supra* (57 Cal. App. 449, 451) declared:

“Since the original submission of this cause the supreme court has decided the case of *People vs. Taylor*, 187 Cal. 378 (203 Pac. 85), covering the precise point which the appellant urges upon this contention. The two cases are identical as to the form of the charge and as to the procedure with relation to the trial thereon in the trial court. In each case the defendant was fully advised upon the *voir dire* examination of the jurors and in the opening statement of the district attorney that the organization which the defendant was charged with having organized and assisted in organizing in violation of the terms of the Criminal Syndicalism Act was the Communist Labor Party of Oakland, a local branch of the Communist Party of California. This being so, we are bound in conformity with the decision in *People vs. Taylor, supra*, to hold that the appellant's first contention is void of merit.”

Second Point.

THE STATUTE DOES NOT DENY EQUAL PROTECTION OF THE LAWS.

Plaintiff in error contends that the statute in question denies equal protection of the laws because it applies only to those who commit the acts in question

for the purpose of effecting a *change*, and does not include those who do the same things to maintain an industrial or a political condition.

The equal protection of the laws is secured where the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.

Duncan vs. Missouri, 152 U. S. 382;

Atchison, etc. R. Co. vs. Mathews, 174 U. S. 104;

McPherson vs. Blacker, 146 U. S. 39.

A mere statement of the above proposition would seem to be determinative of this question. Manifestly this statute applies to all persons who do the things therein denounced. It is not limited in its language or effect to employees, but includes employers; it is not confined to laborers, but includes capitalists as well; it makes no distinction between the poor “wobbly” and the rich communist. The present case is proof of this, for the record shows, and it is asserted in the opening brief (p. 2), that plaintiff in error “is a woman of refinement and culture * * * once possessed of wealth.” This same point was thus disposed of in

People vs. Wieler, 55 Cal. App. 687:

“Counsel for plaintiff points out that the act of April 30, 1919 (Stats. 1919, p. 281), and known as the criminal syndicalism law, penalizes certain acts done to accomplish an industrial or political change, but does not penalize the same acts if done for the purpose of maintaining and perpetuating

the same industrial or political condition. In other words, the attack is that certain things could have been penalized which have not been penalized. The same identical argument was made in the case entitled *In re Miller*, 162 Cal. 687 (124 Pac. 427). The court was considering the act of 1911 (page 437), forbidding the employment of women for more than eight hours and had in certain places. At page 697 of 162 Cal. (124 Pac. 430) the court says: 'The next objection is that the act is special because there are no reasons for making the restriction as to the particular employments mentioned in the act which do not apply with equal force to other similar occupations. There may be, and probably are, other occupations followed by women which are equally injurious to their health, and which should also be regulated. But if this be true it does not make the law invalid. If there are good grounds for the classification made by the act, it is not void because it does not include every other class needing similar protection or regulation.' " (Pp. 689, 690.)

The Supreme Court of Washington said on this subject in

State vs. Hennessy, 195 Pac. 211 (at 215):

"The fourth point is that the statute is class legislation. The argument here seems to be based on the assumption that it was 'intended to restrict the discussion of economic and industrial questions among labor organizations.' There is nothing, however, on the face of the act to justify this assumption, and the court, in considering the

question, is governed by its terms. The legislature has power to pass all needful police regulations, and so long as such regulations bear with equal weight upon all in like situation or of the same class, they are upheld by the courts. *State vs. Fraternal Knights & Ladies*, 35 Wash. 338, 77 Pac. 500; *State vs. Nichols*, 28 Wash. 628, 69 Pac. 372; *State vs. Nicolls*, 61 Wash. 142, 112 Pac. 269, Ann. Cas. 1912B, 1088. The act is general in its terms and provides that 'whoever' shall do the things there prohibited shall be guilty of a felony. Under this language any one, no matter what his business association or professional calling might be, who did the things prohibited by the act, would be subject to its provisions."

The Minnesota Supreme Court has even more fully answered this argument in

State vs. Moilen, 167 N. W. 345, at 347:

"It is next contended that, since the statute is limited in its application to employer and employee, with protection only to the employer to the exclusion of all other persons, it is class legislation and a denial of the equal protection of the law, and for that reason unconstitutional and void. The point is without force. While the practice of sabotage applies only between employer and employee, the other methods of terrorism referred to in the statute in that respect has general application. But for the purposes of the case it may be conceded that the statute applies only to the relation of employer and employee, yet we have no difficulty in affirm-

ing its validity against this attack. The relation of master and servant, employer and employee, has long been the basis and foundation for specific legislation in this state, as well as in the other states of this country. And though often vigorously challenged as class legislation statutes applying only to that relation have in later years been sustained by the courts with few exceptions."

Numerous citations supporting the above contention thereupon follow.

Says the Oregon Supreme Court in

State vs. Laundry, 204 Pac. 958 (at 964) :

"The syndicalism statute is not class legislation. It affects all alike. It does not discriminate against some or favor others."

Likewise we find the Idaho Supreme Court declaring in

State vs. Dingman, 219 Pac. 760 (at 764) :

"Neither do we think that this statute is open to the objection of creating an unreasonable distinction between classes and persons, because it limits the offense to the advocacy of the doctrine announced as a means of accomplishing industrial and political reform, and does not, in terms, at least, make such advocacy a crime if committed for other purposes, within the act."

Plaintiff in error cites the case of

Truax vs. Corrigan, 257 U. S. 311,

on this point. But that case if anything is authority

for the validity of the legislation herein attacked. It holds the anti-injunction law of Arizona in labor disputes unconstitutional because it "operates to make lawful such a wrong as * * * deprives the owner of the business and the premises of his property without due process, and can not be held valid under the 14th amendment." The court further condemns "moral coercion by illegal annoyance and obstruction," for as it says "violence could not have been more effective." Be this as it may, it should be a sufficient answer to point out that this case has no application to the instant one because the statute there considered expressly referred to controversies between "employers and employees," whereas manifestly the criminal syndicalism law as above noted is not so limited, and applies to every person, irrespective of condition, employment, or class.

Free Speech Not Abridged.

Plaintiff in error without having made a direct point of it, has devoted much of her brief to the argument that the statute infringes upon the right of free speech. As to this the Supreme Court of California says in

People vs. Steelik, 187 Cal. at 375:

"The right of free speech was guaranteed to prevent legislation which would by censorship, injunction, or other method prevent the free publication by any citizen of anything that he deemed it was necessary to say or publish. * * *

The right of free speech does not include the

right to advocate the destruction or overthrow of government or the criminal destruction of property. The Criminal Syndicalism Act does not violate the right of free speech. * * *

It is expressly provided in our constitution that the publisher is liable for an abuse of this power and for any unlawful publication. This statute does not prevent the publication; it punishes the publisher, and declares punishable the character of publication denounced by the act as illegal. The legislature has power to punish propaganda which has for its purpose the destruction of government or the rights of property which the government was formed to preserve. (*People vs. Most, supra.*) It is clear that the statute does not violate the right of free speech as defined by law. (6) The defendant, however, is not in a position to raise the point, for he is not charged with or convicted of a violation of the Criminal Syndicalism Act involving anything that he said or published as hereinbefore indicated."

In *State vs. Boyd*, 91 Atlantic 586, at 587:

"The fundamental answer to the point raised is that free speech does not mean unbridled license of speech, and that language tending to the violation of the rights of personal security and private property, and toward breaches of the public peace, is an abuse of the right of free speech, for which, by the very constitutional language invoked, the utterer is responsible. Incitement to the commission of a crime is a misdemeanor at common law, whether the crime advocated be actually committed or not (*State vs. Quinlan, supra*); and this (by the weight of authority) whether the crime advo-

cated be a felony or a misdemeanor (12 Cyc. 182, and cases cited). That the right of free speech is not unlimited is well settled."

State vs. Holm, 166 N. W. 181, at 183:

"It is settled that the state may prohibit publications or teachings which are injurious to society, or which tend to subvert or imperil the government or to impede or hinder it in the performance of its public and governmental duties without infringing the constitutional provisions which preserve freedom of speech and of the press. These constitutional provisions preserve the right to speak and to publish without previously submitting for official approval the matter to be spoken or published, but do not grant immunity to those who abuse this privilege, *nor prevent the state from making it a penal offense to publish or advocate matters or measures inimical to the public welfare.*"

People vs. Laundry, 204 Pac. 958, at 965:

"The Syndicalism Act does not violate the constitutional right to speak freely nor the constitutional right to assemble peaceably."

People vs. Lloyd, 136 N. E. 505, at 513:

"It would be a strange constitution, indeed, that would guarantee to any man the right to advocate the destruction by force of that which that constitution guarantees to the people living under its protection."

The following observation of this court in *Schaefer vs. U. S.*, 251 U. S. 467, at 477, is very appropriate:

“A curious spectacle was presented: that great ordinance of government and orderly liberty was invoked to justify the activities of anarchy or of the enemies of the United States, and by a strange perversion of its precepts it was adduced against itself. In other words and explicitly, though it empowered congress to declare war and war is waged with armies, their formation (recruiting or enlisting) could be prevented or impeded, and the morale of the armies when formed could be weakened or debased by question or calumny of the motives of authority, and this could not be made a crime—that it was an impregnable attribute of free speech upon which no curb could be put. Verdicts and judgments of conviction were the reply to the challenge and when they were brought here our response to it was unhesitating and direct. We did more than reject the contention; we forestalled all shades of repetition of it including that in the case at bar.”

Citing:

Schenck vs. U. S., 249 U. S. 47;

Frohwerk vs. U. S., 249 U. S. 204;

Debs vs. U. S., 249 U. S. 211;

Abrams vs. U. S., 250 U. S. 616.

Conclusion.

Much of the "Brief for Plaintiff in Error" is devoted to political rather than legal argumentation. It is asserted that the act is "repugnant to * * * a free America," is "subversive of governmental republicanism," and "mocks the theory of democracy." On the contrary, the very purpose of the statute was and is to safeguard the rights of property from the evils of sabotage, the liberties of the individual from mass terrorism, the State and Union from insidious treason, culminating in the horrors of revolution.

It is beside the question to argue, for all agree that men can not be punished for their thoughts provided they are not translated into illegal action. No man can be tried for his opinions so long as he does not incite riots or counsel crime. As said by Mr. Justice Hart in

People vs. Roe, supra (209 Pac. 385, at 386):

"While, as stated, there is no criminal purpose to be imputed to the fact of the mere advocacy of a plan for the government of the peoples of the earth which would or might bring to them what may well be termed a condition of consummate beatitude in wordly affairs, yet, when in attempting to crystallize such a condition any organization resorts to criminal acts of any character, or proposes to do it by the destruction of property and vested rights, then it has clearly

transcended the line of demarcation between right and wrong; and the vice of the whole scheme of the organization known as the I. W. W. is, according to the testimony in this case, in the methods which it advocates and to which its members without scruples resort for carrying out its principles, and as to this phase of the case the record before us overflows with proof of the most dastardly crimes known to the criminal law which were resorted to for the avowed purpose of terrorizing the people, in the vain hope of intimidating them into accepting the propaganda of the I. W. W. as the true faith in the matter of government."

To the same effect it is held in

People vs. Lloyd, 136 N. E. 505, at 530:

"If such a program were advocated by a few men in any community, they would be promptly arrested and punished, and no one would have the temerity to defend their acts. But plaintiffs in error seem to take the position that because their band has become so large and the nefarious doctrines they advocate have assumed world-wide proportions, it must be held to be an honest effort to reform a bad system of government. The fact that a conspiracy to commit a felony assumes tremendous proportions does not change the character of the conspiracy."

To suppress all such conspiracies and activities having as their object the overthrow of this free government, the criminal syndicalism law was enacted in

this and other states, and we respectfully submit that in its essence it is fundamentally sound and constitutional in that it stands out as one of the most effective bulwarks of the constitution itself.

Respectfully submitted.

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No. 22

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

CHARLOTTE ANITA WHITNEY,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF
CALIFORNIA,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION ONE,
STATE OF CALIFORNIA.

BRIEF OF DEFENDANT IN ERROR ON REHEARING

U. S. WEBB, Attorney General of the State of California,
JOHN H. RIORDAN, Deputy Attorney General of the
State of California,
Attorneys for Defendant in Error.

CALIFORNIA STATE PRINTING OFFICE

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No. 10.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1925.

CHARLOTTE ANITA WHITNEY,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF
CALIFORNIA,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION ONE,
STATE OF CALIFORNIA.

*BRIEF OF DEFENDANT IN ERROR ON
REHEARING.*

Foreword.

In view of the additional briefs filed and additional points made on behalf of plaintiff in error in recent months and subsequent to the filing of our *one* brief in this matter, which was addressed solely

to the points made in plaintiff's opening brief, we deem it our duty both to the court and to the cause to ask leave to file this supplemental argument. We shall avoid repetition of the argument made in our first brief, which was directed principally to the original and main contention of plaintiff in error, as to the alleged unconstitutionality of the California Criminal Syndicalism Act, deeming that it will be sufficient to merely refer this court to the numerous decisions therein cited with the additional authority (since decided) of

Gitlow vs. New York, 45 Sup. Ct. 625.

Jurisdiction.

In fairness and candor we deem it proper to state that we have entertained the view, and so intimated at the oral argument, that plaintiff in error had duly made and saved its objection to the invalidity of the *statute* itself, but *not* the unconstitutionality of its *application*. In other words, inspection of briefs filed on behalf of this plaintiff in the lower courts (reproductions of which have been recently filed herein) and her "assignments of error" will show that the only arguments made which at all impinge upon the Fourteenth Amendment are but three, to wit, (1) that the act is void for indefiniteness and the information in the language thereof insufficient; (2) that the act discriminates against those who desire a change in political and industrial conditions and favors those who oppose such change;

and (3) that the act is an abridgement of the freedom of speech.

As a confirmation of the accuracy of this statement we refer to plaintiff's "Petition for Rehearing" in this court, and more particularly pages 3 to 6 thereof, wherein counsel summarizes the arguments made on her behalf in the state appellate tribunals, from which it is manifest that the sole point of attack was upon the law itself rather than its application. Plaintiff virtually concedes this, for on page 6 of the petition just referred to it is stated that all of these points were argued in this court "and *additional arguments* were adduced supporting plaintiff's in error contention that the statute *as applied in her case* violated the due process clause of the Fourteenth Amendment." (Our italics.) This is only too true, for many months after the original briefs were filed and after the decision of the *Gitlow* case, plaintiff for the first time raised the objection of the unconstitutionality of the application of the law. The vice of such proceeding as we view it is this. It is not contended that this act has been applied any differently in plaintiff's case than that of other persons prosecuted thereunder as was properly contended in that line of cases headed by *Yick Wo vs. Hopkins*, 118 U. S. 356, but the object seems to be to lead us far afield into the domain of voluminous and complex facts, the weight and effect of which were and can only be determined by

our constitutional triers of fact, to wit, a jury. *The endeavor now appears to be to have this court weigh the evidence rather than adjudicate the validity of the statute.* Thus in the brief filed immediately prior to the oral argument and upon such argument, learned counsel for plaintiff presented this case to this court as to a jury, maintaining that plaintiff in error was innocent of the commission of acts upon which she was found guilty by a jury, further arguing that she was a mere passive spectator and that her criminality had been made to depend on the acts of other persons occurring both prior and subsequent to the date of the crime charged. We respectfully submit that this is ignoring the rule that decisions on question of fact by a jury can not be reviewed on a writ of error.

Dower vs. Richards, 151 U. S. 658;

Chicago etc. Railroad Co. vs. Chicago, 166 U. S. 226, 242.

“It is well settled in this court that a review of the judgment of a state court is confined to the assignments of error made and passed upon in the judgment of the state court brought here for review. The assignment of errors in this court can not bring into the record any new matter for our consideration.”

Harding vs. Illinois, 196 U.S. 78;

Waters-Pierce Oil Co. vs. Texas, 212 U. S. 112.

It is not sufficient that the claim of right under

the constitution is made in the briefs or oral arguments.

Sayward vs. Denny, 158 U. S. 180;

Zadig vs. Baldwin, 166 U.S. 485.

A party who has raised only *one* federal question in the state court can not come into this court and argue *another* which was not raised in any of the courts below, even though "an inspection of the record shows the existence of facts upon which the question might have been raised."

Dewey vs. Des Moines, 173 U. S. 193.

As we can not anticipate in advance the scope which this hearing may take, we deem it proper to now make reply *seriatim* to "Points I-X" made in the brief filed by plaintiff in error immediately preceding the last hearing of this matter. Before doing so it becomes necessary to briefly sketch the facts of this case.

The Facts.

On or about August 16, 1918, plaintiff sent a ballot to the Socialist Party in Oakland, California, of which she was then a member, in which she voted for certain radicals (Bedacht, Taylor, Ragsdale and Dolsen) as delegates to the national convention of the Socialist Party at Chicago (pp. 205-206). These delegates were among other radicals at this convention (calling themselves the "Left Wing") who bolted the Socialist Party and organized the Com-

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✓ munist Labor Party of the United States. (P. 100.) On November 8, 1919, the secretary of the "Local Oakland, Communist Labor Party," directed a letter to the "California Communist Labor Party Convention, Loring Hall, Oakland, California," reading as follows:

✓ "This is to inform you that Local Oakland, Communist Labor Party, with 286 members in good standing, has elected the following 16 comrades to sit in this convention in accordance with the convention call."

✓ Plaintiff's name was No. 12 on this list (p. 152). Witness Ragsdale, a member of Local Oakland, testified that this local had already endorsed the Communist Labor Party and had withdrawn from the Socialist Party (pp. 154-155). It was also established that she held a *membership card* at this time in said Oakland branch of the Communist Labor Party (pp. 190-191).

That plaintiff fully understood the purpose of the meeting is shown by her statement on the witness stand, viz: "It was a convention to formulate the principles and to put in existence the Communist Labor Party, a political party for California, to be a *branch* of the National Communist Labor Party." (P. 309.)

Plaintiff was the very first person to present a report. As chairman of the "Credentials Committee" she presented a report designating those authorized to sit in the convention. (P. 84.) The opening ✓

anthem of this convention, which was originally sung at the said Chicago meeting, was in part as follows:

“Glor-ious, Glor-ious,
We’ll make the Bolshevik victorious;
Praise to the plutes, they’re making more of us,
While Gene lies in prison for us all.

Long we’ve waited in the night,
Working for the dawning light,
Now it’s coming, all unite,
Rise, Rise, Rise!

All who right and justice seek,
Burst your bonds, no longer weak,
Unite and join the Bolshevik,
Rise, Rise, Rise!”

It will be noted that the foregoing anthem is the very antithesis of the national anthem which is usually sung at conventions and assemblages of American citizens. At the very threshold it shows the temper and the spirit as well as the purpose of this organization. It contains, not merely language of *incitement*, but even of *exhortation*, to rise and join and making common cause with the Bolshevik or Communist Party of Russia, and to follow their tactics in America in effecting the release of Debs.

Plaintiff was also a member of the “Resolutions Committee” (Folio 128), and signed certain “Resolutions Reported Out By This Committee,” (Folios 145 and 147). While it is true that certain of these

resolutions pointed out the advantage of political action, they did not *exclude other means* calculated to promote the ends of the organization. Indeed, one recommended *forcing the release* of class war prisoners (p. 103).

Plaintiff was elected one of two alternate members of the governing body of the organization, to wit, the State Executive Committee (p. 121). Immediately thereafter, the constitution of the state organization was adopted (p. 121).

The first two sections read as follows:

“Section 1. The name of this organization shall be The Communist Labor Party of California.

“Section 2. It shall be *affiliated with the Communist Labor Party of the U. S. of America and subscribe to its Program, Platform, and Constitution*. Through this affiliation it shall be *joined with the Communist International of Moscow.*”

It is unnecessary to quote further from this document, for the language just quoted can mean only one thing and that is that the Communist Labor Party of California affiliated with the Communist Labor Party of the United States and the Communist International of Moscow, whose general history is a matter of common knowledge. The California branch of this party *adopted by reference* the “Program, Platform, and Constitution” of the National Communist Party, and these docu-

ments thereby became a part of its organic institution, just as much as though they were included *hæc verba* in its constitution.

+ “The Communist Labor Party of the United States of America declares itself in full harmony with the revolutionary working class parties of all countries and stands by the principles stated by the Third International formed at Moscow.

* * * * *

With them it also fully realizes the *crying need for an immediate change* in the social system; it realizes that the time for parleying and compromise has passed; and that now it is only the question whether all power remains in the hands of the capitalist or is taken by the working class.

X The Communist Labor Party proposes the organization of the workers as a class, the *overthrow* of capitalist rule and the conquest of political power by the workers. The workers organized as the ruling class, shall, through their government make and enforce the laws; they shall own and control land, factories, mills, mines, transportation systems and financial institutions. All power to the workers!

* * * * *

+ The Communist Labor Party of America declares itself in complete accord with the principles of communism as laid down in the Manifesto of the Third International formed at Moscow. (Rec. p. 172.)

* * * * *

The working class must organize and train

itself for the capture of state power. (Rec. p. 172.)

* * * * *

+ The Dictatorship of the Proletariat shall transfer private property in the means of production and distribution to the working class government, to be administered by the workers themselves. It shall nationalize the great trusts and financial institutions. It shall abolish capitalist agricultural production.

+ The present world situation demands that the revolutionary working class movements of all countries shall closely unite.

+ The most important means of capturing state power for the workers is the action of the masses, proceeding from the place where the workers are gathered together—in the shops and factories. The use of the *political* machinery of the capitalist state for this purpose is only *secondary*.

* * * * *

The years of Socialist activity on the political field have brought no increase of power to the workers. Even the million votes piled up by the Socialist Party without any proportionate representation. *The Supreme Court, which is the only body in any government in the world with power to review legislation passed by the popular representative assembly, would be able to obstruct the will of the working class, even if Congress registered it, which it does not.* The constitution, framed by the capitalist class for the benefit of the capitalist class, can not be

amended in the workers' interest, no matter how large a majority may desire it. (p. 173.)

+ *Not one of the great teachers* of scientific Socialism has ever said that it is possible to achieve the *Social Revolution by the ballot.*

* * * * *

In any mention of *revolutionary* industrial unionism in this country, there must be recognized the immense effect upon the American Labor movement of the propaganda and *example* of the INDUSTRIAL WORKERS OF THE WORLD, whose long and *valiant struggles* and heroic sacrifices in the class-war have earned the respect and affection of all workers everywhere. We greet the revolutionary industrial proletariat of America, and *pledge them our wholehearted support* and cooperation in their struggles against the capitalist class." (Rec. p. 176.) (Our italics.)

A very brief illustration of the propaganda thus endorsed will be found in the report of Lambert, the secretary of the I. W. W., viz:

"To the Delegates of the Tenth Convention of the I. W. W.

+ FELLOW WORKERS: In submitting the financial report of the Wheatland Hop Pickers' Defense Committee, I believe that it would not be out of place to give some account of the efforts made to effect the release of our imprisoned Fellow Workers. They were tried and sentenced by the Superior Court of Yuba County, State of California, to life imprisonment for

their activities in forcing better working and living conditions in the Agricultural Industry of California. An appeal was taken to the Third District Appellate Court and the lower court was upheld. The case was then carried to the Supreme Court of the state for a rehearing, but a rehearing of the case was refused. Agitation and action on the job was continually carried on by the members of the I. W. W. *and the State of California has already paid eight million dollars per year (the state's own figure) since 1913 for holding Ford and Suhr in prison.* Early in 1915 the case came up on a petition for pardon before the Governor. The matter, as far as Governor Johnson was concerned, lay dormant for over nine months. He then made the statement that he would not consider the cases of Ford and Suhr further until sabotage and threats of sabotage were stopped. It is not generally known that more than forty members of the I. W. W. languish in prisons of California, serving sentences ranging from one to six years, for their activities, nor that two of our members have been killed in the fight with the employing class of California for the freedom of Ford and Suhr. These things have not dampened our spirits in the least. Nor have they altered our determination to keep *banging away at them* until either Ford and Suhr are free, or that we are all in prison with them. We do not want any money (fol. 310) from the General Organization; we can get along without that, but what we do want is 'Men, and lots of men, who are willing to help † us *battle* the employing class of California by

any and all means at our command, for the freedom of Richard Ford and Herman Suhr.'

Yours for the O. B. U.,

C. L. Lambert,
Secretary."
(p. 231).

(Our italics.)

✓ The record shows that the example of this latter organization, thus endorsed, included the use of incendiary bombs (265), burning of barns and hay stacks (266), poisoning of cattle with cyanide of ✓ potassium and injuring fellow workers who would not join them by putting lye in their shoes (271), ✓ crop destruction by sowing noxious weeds and destruction of machinery by use of emery dust (228). ✓ To meet this situation and as a matter of self-preservation, the State of California enacted its Criminal Syndicalism Law.

That plaintiff's advocacy of the example of the I. W. W. was not merely constructive, and that she was in entire sympathy with the I. W. W. and familiar with its leaders and practices, is indicated by the following facts:

A former member of the I. W. W. testified that he knew her, and had seen her several times in San + Francisco at I. W. W. headquarters as early as July, + 1918 (p. 274). She was present at I. W. W. headquarters at the time San Francisco police officers raided the place and carried Diamond and one, Stredwick, off to jail (p 281). She also discussed

with Diamond the circulation of defense letters on behalf of the I. W. W. prisoners in Sacramento (p. 281-2). She admitted that she corresponded with Esmond, an I. W. W. in San Quentin and Fort Leavenworth prisons (p. 315) and also with Stredwick (p. 316), above alluded to.

That she not only assisted in organizing, but actually became a member of Communist Labor Party is shown by the testimony of the secretary of the Oakland Local branch.

But her membership even up to the time of trial is conclusively established by her bold admission on the witness stand, viz:

“Q. You are a member of the Communist Labor Party?

A. I am.” (p. 310.)

This alone is sufficient evidence as to the main issue of membership. It was not necessary for the state to prove that plaintiff herself committed any other act. As said by this court in

Aikens vs. Wisconsin, 195 U. S. 194,

construing a statute prohibiting a combination of two or more persons for the purpose of maliciously injuring another in his reputation, trade or business:

“The statute is directed against a series of acts, and the acts of several, the acts of combining, with intent to do other acts. ‘*The very plot is an act in itself.*’ * * * No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most

innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the constitution is sufficient to prevent the punishment of the plot by law." (Our italics.)

"The gist of the offense is the criminal confederacy, and it has been stated that if the word 'conspiracy' were substituted for the words 'organization, society, group or assemblage,' the meaning of the law would be in no wise changed. To charge persons with being members of a society of persons organized to advocate, teach or aid and abet criminal syndicalism is in effect to charge them with conspiring to advocate, teach or aid and abet criminal syndicalism. Such conspiracy is complete *without* the commission of any overt act.

* * * * *

"It is not the character of the system to be established, but the means advocated and employed by the conspiracy in effecting its ultimate object, that is material in the prosecution, for, it is said, however beneficent may be the object of an organization, the conspiracy is criminal if it advocates the accomplishment thereof by unlawful acts of force and violence or unlawful methods of terrorism."

23 California Jurisprudence, pp. 1110-1112.

That plaintiff in error did not withdraw from this party after it adopted the platform of the National Communist Party and endorsed the example and

conduct of the I. W. W., is shown by her above admission and by the testimony of the secretary of the convention, Taylor, to the effect that she was present at the second meeting of the Executive Committee in San Jose about December 9, 1919 (p. 125), and attended another meeting "about a week ago" (p. 128). In other words, plaintiff did not withdraw even after her indictment and arrest, but was still a member at the time of the trial. Police Inspector Kyle saw her on five different occasions at Loring Hall, the C. L. P. headquarters—November 17, 18 and 19, some time in December and January 5th. (Folio 277.) This same witness testified that the police took a "ton" of literature and printed propaganda from these same headquarters (281), numerous excerpts of which are in the record, showing the same to be of the most inflammatory, revolutionary and syndicalistic nature. Among these are the following to which we shall, for sake of brevity, refer the court to the record for an illuminating lesson as to nature and evils of syndicalism:

"Syndicalism" by Ford & Foster, pp. 216-219.

"Sabotage" by Walker C. Smith, pp. 250 to 254.

"Sabotage" by Emile Pouget, pp. 246-249.

"The Revolutionary I. W. W." by Perry, pp. 233-234.

"The I. W. W. Its History, Structure and Methods," by Vincent St. John, p. 234.

"The General Strike," by William D. Haywood, pp. 243-245.

“Sabotage,” by Elizabeth Gurley Flynn, pp. 272-274.

We submit that the record abundantly establishes the two principal issues of fact, to wit, (1) membership and (2) the criminal character of the organization. In other words, the foregoing statement which is the mere sketching of the record, shows that plaintiff was one of the most active organizers and members of the Communist Labor Party of California, which was affiliated with the Communist Labor Party of the United States, and was at the same time a member of Local Oakland, the Communist Labor Party from which she was a delegate to the convention which formed the state party; that her activities in connection therewith covered a period of at least a year prior to the organization of the state branch and continued, according to her own admission, right up to and including the time of the trial; in short she was not an innocent bystander or passive spectator, but was one of the *leaders* in this movement in the State of California and contributed much strength and impetus to the movement by reason of her influence and prestige.

The Information—Its Sufficiency—No Denial of Due Process.

In plaintiff's Point I, in the brief filed immediately before the first hearing in this court,

Hodgson vs. Vermont, 168 U. S. 262,
is cited as authority for the proposition that the

generality of the information denies due process. It is held in that case that the information which an accused must receive "is that which will acquaint him of the *essential* particulars of the offense * * *." In the instant case the vice of the crime was not the name given to the organization, but rather its character, purposes and the things for which it stood. The information did describe the organization by giving its essential characteristics, to wit, "an organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism," the latter term having been specifically defined by the statute.

In the *Hodgson* case the accusation did *not* state the *name* of the person to whom the liquor was alleged to have been sold, nor the *place* where it was so sold. This court said:

"The prescribed form covers the offense in the exact and easily understood language of the *statute which creates* it. This is sufficient * * * It is not an *ancient* crime which has been, from time *immemorial*, clothed in *special terms* which, by long use, have become the most apt and definite ones to describe the exact crime. The statute sometimes prescribes the punishment of a common law crime without defining it, or creates an offense and prescribes no form for an information. In such cases it is well held that the common law requirements in charging it must be met * * * But it is sufficient to charge a statutory offense in the terms of the statute. * * *"

The California Criminal Syndicalism Act is a statutory offense, unknown to the common law, of recent enactment and designed to meet new conditions. Mention is made in the case just cited that more particular information was subsequently furnished to the accused upon a bill of particulars.

In any consideration of what constitutes due process with respect to the administration of justice in criminal cases in California regard must be had to an important part of its organic law providing that

“No judgment shall be set aside * * * for error as to any matter of pleading, or procedure, unless, after an examination of the entire cause including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.”

California constitution, Sec. 4½, Art. VI.

It is thereby made the duty of the appellate tribunals in California to abstain from reversing cases for procedural errors that do not result in actual injury or prejudice to the accused. The record here shows that the District Court of Appeal of California following the mandate of its constitution, after an examination of the case, determined that the defendant in the trial court did not suffer any prejudice from the circumstance that the name of the organization was not specified (p. 4, fol. 6). The said court found that the accused had been fully advised upon a long *voir dire* exam-

ination of the jurors, which part of the record has not been brought up to this court, and in the opening statement of the district attorney, of the organization she was charged with having assisted in organizing and becoming a member thereof (p. 4, fol. 6).

But in addition to this and long before the trial she had been apprised not only of the nature of the accusation but as well much of the evidence supporting it. The proceeding against her was not by indictment but by "information." In California an information can only be filed by the district attorney after a "preliminary examination" or trial before a magistrate and his determination that there is sufficient cause to believe the defendant guilty of a public offense. (Secs. 858 to 883, both inclusive, California Penal Code.)

Upon such preliminary examination the defendant therein has the opportunity of hearing all the evidence produced, cross-examining witnesses and introducing a defense if desired. The accused by reason of this procedure is necessarily advised of much, if not all, of the state's case in advance of the filing of the information and trial in the superior court. Not only must it be presumed that the accused in the instant case was advised of the nature of the charge against her, but it actually appears from the record before this court that she knew what constituted the real substance of the state's case. The principal portion of the record connect-

ing plaintiff in error with the Communist Labor Party is found in the testimony of her fellow member, Reed (pp. 151-194), who did not appear as a witness at the trial in the superior court but whose *deposition*, given at the preliminary examination, was read, as provided by law in case of missing witnesses (p. 150, fol. 208). There was no objection to this witness' testimony being received by deposition. As the record shows the information was filed December 30, 1919, and as this deposition given at the preliminary examination must have preceded said information, it thus appears that at least a month transpired between the giving of said deposition and the trial which commenced January 28, 1920, thereby allowing the accused ample time to prepare her defense. The record is devoid of any showing that she at any time was surprised with respect to the nature of the state's case, nor did she at any time request a continuance upon the ground of such surprise. Indeed, plaintiff at no time denied her membership in the Oakland branch of the California Communist Labor Party, which was affiliated with and subscribed to the program and platform of the Communist Labor Party of the United States. That is to say, the Oakland branch was part and parcel of the national organization and devoted to the same principles and purposes.

There is no merit to the suggestion that former jeopardy could not be established under such indict-

ment. The same point was urged in the first case under this statute, to wit:

People vs. Malley, 49 Cal. App. 597 at 608 (194 Pac. 48),

where the court said:

“If he should be again prosecuted for the offense, he may plead his conviction in the manner provided for in the code, and establish the identity of the cases by evidence, the burden being upon him.”

Citing:

People vs. Faust, 113 Cal. 172, 45 Pac. 261;
People vs. Burke, 18 Cal. App. 72, 122 Pac. 435.

In other words, in California, a person is not confined to the judgment roll in establishing a plea of former jeopardy, but may prove it by evidence *aliunde*.

“Due process of law,” as here used, refers to the law of the land in each state, deriving its authority from the inherent and reserved powers of the state, exerted within the limits of the fundamental principles of liberty and justice underlying our civil and political institutions. What is due process of law in the respective states is regulated and determined by the law of each state, and this amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations enforced, provided

the method of procedure adopted for these purposes gives reasonable notice and affords a fair opportunity to be heard before the issues are decided.

Hallinger vs. Davis, 146 U. S. 320;
U. S. vs. Cruikshank, 92 U. S. 542;
Hurtado vs. California, 110 U. S. 535.

Law, in its regular course of administration through the courts of justice, is due process, and when secured by the law of the state, the constitutional requisite is satisfied.

Caldwell vs. Texas, 137 U. S. 697;
Duncan vs. Missouri, 152 U. S. 382;
Munn vs. Illinois, 94 U. S. 123.

A decision upon a matter of practice under the state procedure does not draw in question any right under this provision.

Thorington vs. Montgomery, 147 U. S. 492;
Ballard vs. Hunter, 204 U. S. 258;
Cross vs. North Carolina, 132 U. S. 140.

Evidence of Activities of Others Was Received for Sole Purpose of Determining Character of Organization and so Limited by Instruction of Court.

Plaintiff's Point II, to the effect that the verdict was based on acts occurring prior to the enactment of the law, is based upon a misconception of the facts. The record shows that plaintiff in error was one of the most active persons present at the convention held in Loring Hall, Oakland, California,

November 9, 1919, which resulted in the formation of the "Communist Labor Party of California," and which adopted as its platform the platform of the Communist Labor Party of the United States, which platform endorsed the propaganda and example of the I. W. W., further declaring:

"We greet the revolutionary proletariat of America, and *pledge* them our wholehearted support * * *." (P. 176.)

As a keynote to the Oakland convention, "one of the speakers praised the I. W. W. * * *." (P. 98.)

Evidence of and concerning the propaganda and example of the I. W. W. and its activities was introduced for the purpose of showing the character and the purposes of the Communist Labor Party of California, this being one of the essential facts in issue. Such evidence was competent under

Debs vs. U. S., 214 U. S. 211;

Schenck vs. U. S., 249 U. S. 47;

Baer vs. U. S., 249 U. S. 47;

Hitchman Co. vs. Mitchel, 245 U. S. 229.

Thus, in the *Debs* case the the criminal records of certain radicals whom he extolled were received in evidence, this court saying:

"* * * It was proper to show what those grounds were in order to show what he was talking about, to explain the true import of his expression of sympathy and to throw light on the intent of the address * * *."

The defense in the instant case was not so much of the plaintiff as of her *party*. It was important to determine what this party advocated. This evidence was not introduced to prove her guilty of prior acts committed by other syndicalists. Nor was it so considered by the jury.

The court gave a *limiting* instruction, viz:

“Evidence has been admitted in this case of statements, acts and declarations of persons other than the defendant, and not made and done in the presence of the defendant, and of printed matter purporting to be printed matter of the I. W. W. and of the Communist Labor Party, or circulated or publicly displayed by the I. W. W. and by the Communist Labor Party, and taken from places and at times at which the defendant was not present, and which was not directly connected with the defendant, and which the evidence does not show was circulated, printed, or publicly displayed with her acquiescence or consent. Evidence has also been admitted of other objects which are not directly connected with the defendant.

The court instructs you that *such evidence was admitted for but one purpose*, and is to be considered by you for that one purpose only, and that is *to determine the character of the organization* of which it is claimed the defendant was a member, or which it is claimed she organized or assisted in organizing, namely, whether or not it was an organization, society, group or assemblage of persons organized or assembled to advocate, teach, or aid and abet criminal syndicalism,

as defined in the statute from which I have read to you." (P. 46.)

**Plaintiff Not Penalized for Subsequent Acts of Others,
but for Her Continued Connection With Proscribed
Organization.**

Plaintiff's Point III, to the effect that she was punished for the subsequent acts of other members of her party is refuted by the facts. The record shows that she was one of the most active founders and organizers of the Communist Labor Party, serving on the credentials and resolutions committee at the convention wherein it was organized. It is true that certain resolutions proposed by her recommended the advantages of political action but they did not exclude other and more direct means. When the convention adopted the platform of the Communist Labor Party of the United States, which decried the ballot as a means of accomplishing its aims and extolled and recommended the tactics used by the I. W. W., she could have *withdrawn* from the convention. But this she did not do. On the contrary, she continued for months thereafter to serve as an alternate member of the state executive committee and even at the time of the trial admitted that she was still a member of this organization.

Knowledge and Intent.

Plaintiff's Point IV takes exception to the comment of the California court that it was not concerned with any question as to whether or not plain-

tiff realized that she was giving herself over to forms and expressions of disloyalty and lending her influence to an organization whose purposes savored of treason, saying "it is one of the conclusive presumptions of our law that a guilty intent is presumed from the deliberate commission of an unlawful act. (C. C. P., Sec. 1962.)"

This is fully explained in a later decision of our California Supreme Court involving this act, in

People vs. McClennege, 69 Cal. Dec. 195, at 210 and 211; 234 Pac. 91.

"Unquestionably the legislature had the power to provide that any person who joins an organization organized for unlawful purposes, whether such person is or is not aware of the unlawful purpose, is guilty of an offense."

"Subdivision 5, of the same section, defines knowingly, as follows:

'The word "knowingly" imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission;' * * * "

"The commission of various acts are made punishable under our criminal procedure, even though the doer be ignorant of the fact that the doing of the act constitutes an offense. A mistake of fact, or a want of intent, is not in every case a sufficient defense for the violation of a criminal statute. Statutes enacted for the protection of public morals, public health and the public peace and safety are apt illustrations of

the rule just announced. (*People vs. Ratz*, 115 Cal. 132; *People vs. Griffin*, 117 Cal. 583; *People vs. Sheffield*, 9 Cal. App. 130; *State vs. Hennessy*, 195 Pac. 211, and cases cited.) The latter case quotes the following extract from 8 R. C. L., page 62, as a correct statement of law:

‘ * * * The doing of the inhibited act constitutes the crime, and the *moral turpitude or purity of the motive by which it was prompted and knowledge or ignorance of its criminal character are immaterial circumstances on the question of guilt.* The only fact to be determined in these cases is whether the defendant did the act. In the interest of the public the burden is placed upon the actor of ascertaining at his peril whether his deed is within the prohibition of any criminal statute.’ (See, also, 7 Cal. Jur. 852; *In re Ahart*, 172 Cal. 762; *People vs. O’Brien*, 96 Cal. 171; 16 C. J. 76.)

There is much force in the observation made by Mr. Presiding Justice Finch in the case of *People vs. Flanagan, supra*, to the effect that the average man does not ordinarily become affiliated with political or industrial organizations which may affect national welfare without informing himself as to the cardinal principles of such organization. Political and economic experiences justify the observation. The general principles and primary purposes of all organizations whether political, industrial, benevolent, fraternal or social are quite generally known to the public. We agree with what was said in the *Flanagan* case that: ‘The intent of the defendants must be determined from their voluntary

connection with the conspiracy, viewed in the light of the circumstances which they knew or ought to have known. * * *

* * * * *

A consideration of the entire subject leads us to the conclusion that proof of the act of joining an organization shown to be such as the statute denounces is a sufficient showing of knowledge of the purposes of the organization. *An accused may meet this showing by proof that he was ignorant of its criminal purposes or that he was induced by false or fraudulent representations to become a member of said organization and was ignorant of its purposes.* Of course, if he remained a member and became active in teaching and advocating its doctrines, as was done in the instant case, such conduct would itself be evidence of knowledge of its evil purposes."

Character of Communist Labor Party Is Matter of Common Knowledge, But Plaintiff Was Exceptionally Versed in Its Tenets.

Plaintiff's Point V that defendant could not know at the time of joining the organization whether the action of other persons would give it an illegal character is merely a moot and abstract question. The record shows that a year prior to the organization of the Communist Labor Party in California plaintiff was in sympathy with the radical Socialists and was active in the election of radical delegates, who later organized the Communist Labor Party of the United States. Then after the plat-

form of this party had been promulgated and given wide publicity plaintiff took a leading part in establishing a local and state branch at Oakland. In other words, the principles and program of the party were established prior to the actual formation of the local organizations in California. She was not therefore merely engaged in founding an organization whose purposes and principles were to be formulated in the future, but rather in joining and affiliating with and promoting the expansion of an organization whose program was already well known.

Freedom of Speech Not Abridged by Legislation Prohibiting Teachings, Publications and Propaganda Tending to Imperil or Subvert the Government.

Plaintiff's Points VI, VII, VIII and IX may be summarized under the general objection that the statute and its application in this case infringes upon the right of free assemblage and free speech. This was treated in our brief heretofore filed herein, wherein we cited authorities to the proposition that the right of free speech and assembly does not include unlicensed speech or the right of assembly for every purpose, and that there is no constitutional provision guaranteeing any set of men the right to assemble and advocate the overthrow of the government by force or violence. In addition to the authorities there cited we desire to cite the *Gitlow* case, *supra*, and more particularly the major-

ity opinion of this court which is the most recent expression as well as a complete summary of the law on this subject. The opinion of the court, delivered by Mr. Justice Sanford, reads in part as follows:

“And, for yet more imperative reasons, a state may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional state. Freedom of speech and press, said Story, (*supra*) does not protect disturbances to the public peace or the *attempt to subvert* the government. It does not protect publications or *teachings which tend to subvert or imperil the government* or to impede or hinder it in the performance of its governmental duties. *State vs. Holm, supra*, p. 275. It does not protect publications *prompting the overthrow of government by force*; the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the state. *People vs. Most, supra*, pp. 431, 432. And a state may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several states, by violence or other unlawful means. *People vs. Lloyd*, 304 Ill. 23, 34. See also, *State vs. Tachin*, 92 N. J. L. 269, 274; and *People vs. Steelik*, 187 Cal. 361, 375. In short this freedom does not deprive a state of the primary and essential right of self preservation; which, so

long as human governments endure, they can not be denied.” (Our italics.)

It is noteworthy that this court cited among other cases as authority for its conclusions the case of *People vs. Steelik*, the leading case by our California Supreme Court upon the questions here involved.

Gitlow was convicted of printing and circulating the “Left Wing Manifesto, and also a Communist program and a program of the Left Wing.” The subject-matter of the Manifesto which is subjoined as a footnote to the Gitlow case is substantially identical with that of the Program, Platform and Constitution hereinabove referred to as having been adopted by the Communist Labor Party, of which plaintiff admitted she was a member. But her organization went much further, for it declared itself “in *complete accord* with the principles of Communism, as laid down in the Manifesto of the Third International formed at Moscow,” declaring that the working class “must organize” and “train itself for the *capture* of state power;” that a “Dictatorship of the Proletariat” should be created; that “the revolutionary working class movement of all countries shall closely unite”; that the “most important means of capturing state power * * * is the action of the masses”; and that the “use of political machinery * * * for this purpose is *only secondary*.” (pp. 172-173.) It further and in effect denounced this court as a tool of the capitalist

class and as having arbitrarily predetermined to obstruct and defeat the accomplishment of any radical legislation which might be adopted by congress. The Communist Labor Party also went further than the Manifesto condemned in the *Gitlow* case in recognizing and extolling "the propaganda and example of the Industrial Workers of the World * * *." Instead of disavowing the activities of this organization which are a matter of common knowledge, it classed the same as "valiant struggles and heroic sacrifices in the *class war*." Not content with this, it proceeded to "*pledge them our whole-hearted support and cooperation * * **."

Further and in addition to the above this organization maintained on display at its headquarters at Loring Hall, Oakland, and sold and distributed a large quantity of syndicalistic literature (p. 76, fol. 115; p. 78), including the Manifesto, radical newspapers and about a ton of syndicalistic literature hereinabove referred to in our statement of facts.

Statute Does Not Deny Equal Protection of the Laws.

In Point X plaintiff contends that the statute denies equal protection because it applies only to those who commit the acts in question for the purpose of effecting a *change* and does not include those who do the same things to *maintain* present conditions.

The equal protection of the laws is secured where the laws operate on all alike and do not subject the

individual to an arbitrary exercise of the powers of government.

Duncan vs. Missouri, 152 U. S. 382;

Atchison, etc. R. Co. vs. Mathews, 174 U. S. 104.

As said in *State vs. Hennessy*, 195 Pac. 211, considering a similar act:

“The act is general in its terms and provides that ‘whoever’ shall do the things there prohibited shall be guilty of a felony. Under this language anyone, no matter what his business association or professional calling might be, who did the things prohibited by the act, would be subject to its provisions.”

Says the Oregon Supreme Court in

State vs. Laundry, 204 Pac. 958:

“The syndicalism statute is not class legislation. It affects all alike. It does not discriminate against some or favor others.”

Conclusion.

It is true that the record does not show that this defendant threw bombs, fired hay stacks, or preached on street corners inciting men to assassinate the President, governors and other officials of the nation and this commonwealth, but this was not necessary. The charge was that she assisted in *organizing and became a member of* a society or group of persons organized to advocate, teach and aid criminal syndicalism, which is defined as that doctrine advocating the commission of crime and unlawful acts of

force and unlawful methods of terrorism as a means of accomplishing a change in the present industrial and political structure. It might be more tersely expressed as *revolution by direct action*. History affords several notable examples. One is the recent revolution in Russia. Another, as to which the lapse of a century renders a perspective unbefogged by current political discussion, is the French Revolution. As one concludes his reading of Guizot's account of that memorable human cataclysm and takes up the record in this case, he can not avoid the conclusion that the story here presented might be well *transposed* and substituted for the account of the first period of that revolution. We see the revolution in the process of formation, the intellectuals of that period were "the brains," and the vicious, malignant and Nihilistic element, "the hands."

In the second period the revolution reaches its crest under Robespierre, the supreme dictator. This period is called the "Reign of Terror." Here we see one of the intellectuals leading the mob. Counsel for appellant argue that the record does not show that *defendant* committed any act of violence or sabotage. History does not record that Robespierre personally shot, stabbed or killed any person. He was a philosopher; he professed to ardently love and to be an exponent of "virtue." The good of the masses and the establishment of the Republic, he asserted, were his sole ambition. Yet he was one

of the greatest butchers in history and in contemporary parlance the guillotine was called "Robespierre's razor." The violence and bloodshed of the French Revolution accomplished nothing. In a few years it was succeeded by the Empire and a rule more autocratic than that of Louis XVI. The freedom of French citizenry was really established just before the "Reign of Terror" during the ascendancy of Lafayette and Mirabeau, by *due process of law*, through legislation enacted by the first representative parliament in France, known as the Constituent Assembly, 1789-1791. As Guizot declares:

"It gave France equality before the law, national representation, and that government of the country by the country which has become the watchword of every free people."

In other words, all the good of the French Revolution proceeded not from violence and mob action, but through the orderly processes of law and legislation.

The foregoing suggests the reason for the enactment of the Criminal Syndicalism Act as well as its spirit and purpose. It was designed not to punish the leaders of a revolution *after* the evil had been done, but rather to provide a means of forestalling it in its inception.

Respectfully submitted.

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APPENDIX.

[NOTE.—*The following is taken from the latest and most comprehensive textbook discussion and review of the California Criminal Syndicalism Act found in volume 23, California Jurisprudence, pages 1103 to 1133; which is an encyclopedic summary of the law and practice of the State of California, edited by William M. McKinney, editor, Federal Statutes Annotated, Ruling Case Law, etc. The article, excerpts from which are hereinbelow quoted, has been written since the argument of this case last October and it is herewith submitted for such light and assistance as it may afford the court. The authorities cited as footnotes in the original are inserted in parentheses in their proper places in the text quoted below.*]

“Sec. 1. Definitions—Scope of Article. The term ‘criminal syndicalism’ is defined by statute as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control or effecting any political change. (Stats. 1919, p. 281.) It has been said that criminal syndicalism means, among other things, direct action and sabotage. (*People vs. Lesse*, 199 Pac. 46.) But as indicated by the statutory definition it is *not necessary to constitute this offense that there be acts of violence committed*; mere teaching is sufficient, the acts of violence being merely evidentiary as tending to show the character of the organization in question and

that it does teach and advocate such methods. (*People vs. Wright*, 226 Pac. 952.)”

“Sec. 2. Legislation Proscribing and Constitutionality Thereof.—”

“The act was passed at a time when the practice of sabotage and other unlawful methods of terrorism was deemed a growing menace to law and order in the state. So insistent was the danger that the legislature departed from its usual course and provided that the act should have immediate effect.”

“The legislature has power to pass all needful penal laws, so long as they bear with equal weight upon all in like situation or of the same class. (*People vs. McClenegen*, 234 Pac. 91.) While some of the acts prohibited might have been punishable as constructive treason at common law, the legislature is not precluded from providing for their punishment by the constitutional definitions of treason, as such definitions merely limit the number of offenses punishable as treason at common law. (*People vs. Steelik*, 203 Pac. 78.) The statute does not violate the right of free speech as guaranteed by the federal and state constitutions since that right does not include the right to advocate the destruction or overthrow of government or the criminal destruction of property. (*People vs. Steelik*, 203 Pac. 78.) Nor does the absence of any definition of ‘crime,’ ‘unlawful method of terrorism,’ ‘change in industrial ownership or control,’ and the like, render the statute void for indefiniteness since their meanings may be obtained from the decisions and the code provisions. (*People vs. Steelik*, 203 Pac. 78.) The act is not unconstitutional because it penalizes certain

acts done to accomplish an industrial or political change and does not penalize the same acts if done for the purpose of maintaining and perpetuating the same industrial or political condition. (*People vs. Wieler*, 204 Pac. 410.)”

“Sec. 7. Organizing or Joining Association.— Any person who ‘organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism,’ is guilty of a felony. (Stats. 1919, p. 281.) The gist of the offense is the criminal confederacy, and it has been stated that if the word ‘conspiracy’ were substituted for the words ‘organization, society, group or assemblage,’ the meaning of the law would be in no wise changed. (*People vs. Steelik*, 203 Pac. 78.) To charge persons with being members of a society of persons organized to advocate, teach or aid and abet criminal syndicalism is in effect to charge them with conspiring to advocate, teach or aid and abet criminal syndicalism. (*People vs. McClenneen*, 234 Pac. 91.) Such conspiracy is complete *without* the commission of any overt act.”

“It is not the character of the system to be established, but the means advocated and employed by the conspiracy in effecting its ultimate object, that is material in the prosecution, for, it is said, however beneficent may be the object of an organization, the conspiracy is criminal if it advocates the accomplishment thereof by unlawful acts of force and violence or unlawful methods of terrorism. (*People vs. Flanagan*, 223 Pac. 1014.)”

“III. Indictment and Information.”

“Sec. 11. Organizing or Joining Forbidden Association.—The offense of organizing or belonging to an organization or society organized or assembled to advocate, teach or aid and abet criminal syndicalism may be charged in the language of the statute, since the acts therein denounced are sufficiently described by the language itself to make it perfectly clear what it intended. (*People vs. Casdorf*, 212 Pac. 237.) It is not necessary, however, that the language of the statute be literally followed. It is sufficient, for example, to allege that the defendant ‘did become and remain’ a member of a syndicalistic organization, since by so doing he ‘is’ a member within the intent and meaning of the Syndicalism Act. (*People vs. Thornton*, 219 Pac. 1020.) In charging one with organizing a prohibited society, it is not necessary to name those induced to join, as this element is not mentioned in the statute. (*People vs. Wieler*, 204 Pac. 410.) And it has been held that the name of the organization need not be stated (*People vs. Wieler*, 204 Pac. 410); in any event a failure to do so is not fatal where the offense is charged in general terms and the accused is advised at the beginning of the trial as to the particular organization intended. (*People vs. Taylor*, 203 Pac. 85.)”

“Sec. 5. Advocating Industrial or Political Revolution.—The mere advocacy of a change in industrial ownership or political change to be accomplished by lawful means is not a crime. (*People vs. Eaton*, 213 Pac. 275.) The inhabitants of the United States have both individually and collectively the right to

advocate peaceable changes in our constitution, laws or form of government, although such changes may be based upon theories or principles of government antagonistic to those which now serve as their basis. (*In re Hartman*, 188 Pac. 548.) But it is a felony for any person to advocate the duty, necessity or propriety of committing crime, sabotage, violence or any unlawful method of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change, or for anyone to justify the commission of such unlawful acts with intent to approve, advocate or further the doctrine of criminal syndicalism."

"V. Evidence."

"Sec. 21. Organizing or Joining Association.— It has been held that in a prosecution for organizing or joining a prohibited association, the criminal organization constitutes the *corpus delicti*, and proof of membership therein serves only to connect the accused with the crime. (*People vs. La Rue*, 216 Pac. 627.) Accordingly, where the *corpus delicti* is established by the testimony of witnesses other than the accused, an admission of the accused, that he was a member of the organization in question, is sufficient proof of membership. (*People vs. La Rue*, 216 Pac. 627.)"

"Sec. 22. Criminal Character of Organization.— In a prosecution for membership in an organization which advocates, teaches or aids and abets criminal syndicalism, the criminal character of the organization is a question always to be determined (*People vs. Erickson*, 226 Pac. 637), and must be proved.

(*People vs. Steelik*, 203 Pac. 78.) The evidence is sufficient in this respect where a quantity of the literature of the organization was found at the place where the accused was arrested, and such literature advocated criminal syndicalism. (*People vs. Powell*, 236 Pac. 311.)

SUPREME COURT OF THE UNITED STATES.

No. 3.—OCTOBER TERM, 1926.

Charlotte Anita Whitney, Plaintiff in Error, <i>vs.</i> The People of the State of California.	}	In Error to the District Court of Appeal, First Appellate District, Di- vision One, of the State of California.
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[May 16, 1927.]

Mr. Justice SANFORD delivered the opinion of the Court.

By a criminal information filed in the Superior Court of Alameda County, California, the plaintiff in error was charged, in five counts, with violations of the Criminal Syndicalism Act of that State. Statutes, 1919, c. 188, p. 281. She was tried, convicted on the first count, and sentenced to imprisonment. The judgment was affirmed by the District Court of Appeal. 57 Cal. App. 449. Her petition to have the case heard by the Supreme Court¹ was denied. *Ib.* 453. And the case was brought here on a writ of error which was allowed by the Presiding Justice of the Court of Appeal, the highest court of the State in which a decision could be had. Jud. Code, § 237.

On the first hearing in this Court, the writ of error was dismissed for want of jurisdiction. 269 U. S. 530. Thereafter, a petition for rehearing was granted, *Ib.* 538; and the case was again heard and reargued both as to the jurisdiction and the merits.

The pertinent provisions of the Criminal Syndicalism Act are:

"Section 1. The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of ac-

¹Statutes, 1919, c. 58, p. 88.

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completing a change in industrial ownership or control, or effecting any political change.

"Sec. 2. Any person who: . . . 4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism . . .

"Is guilty of a felony and punishable by imprisonment."

The first count of the information, on which the conviction was had, charged that on or about November 28, 1919, in Alameda County, the defendant, in violation of the Criminal Syndicalism Act, "did then and there unlawfully, wilfully, wrongfully, deliberately and feloniously organize and assist in organizing, and was, is, and knowingly became a member of an organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism."

It has long been settled that this Court acquires no jurisdiction to review the judgment of a State court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a Federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such State court. *Crowell v. Randell*, 10 Pet. 368, 392; *Railroad Co. v. Rock*, 4 Wall. 177, 180; *California Powder Works v. Davis*, 151 U. S. 389, 393; *Cincinnati, etc. Railway v. Slade*, 216 U. S. 78, 83; *Hiawasse Power Co. v. Carolina-Tenn. Co.*, 252 U. S. 341, 343; *New York v. Kleinert*, 268 U. S. 646, 650.

Here the record does not show that the defendant raised or that the State courts considered or decided any Federal question whatever, excepting as appears in an order made and entered by the Court of Appeal after it had decided the case and the writ of error had issued and been returned to this Court. A certified copy of that order, brought here as an addition to the record, shows that it was made and entered pursuant to a stipulation of the parties, approved by the court, and that it contains the following statement:

"The question whether the California Criminal Syndicalism Act . . . and its application in this case is repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States, providing that no state shall deprive any person of life, liberty, or property, without due process of law, and that all persons shall be accorded the equal protection of the laws, was considered and passed upon by this Court."

In *Cincinnati Packet Co. v. Bay*, 200 U. S. 179, 182, where it appeared that a Federal question had been presented in a petition in error to the State Supreme Court in a case in which the judgment was affirmed without opinion, it was held that the certificate of that court to the effect that it had considered and necessarily decided this question, was sufficient to show its existence. And see *Marvin v. Trout*, 199 U. S. 212, 217, *et seq.*; *Consolidated Turnpike v. Norfolk, etc. Railway*, 228 U. S. 596, 599.

So—while the unusual course here taken to show that Federal questions were raised and decided below is not to be commended—we shall give effect to the order of the Court of Appeal as would be done if the statement had been made in the opinion of that court when delivered. See *Gross v. United States Mortgage Co.*, 108 U. S. 477, 484-486; *Philadelphia Fire Association v. New York*, 119 U. S. 110, 116; *Home for Incurables v. City of New York*, 187 U. S. 155, 157; *Land & Water Co. v. San Jose Ranch Co.*, 189 U. S. 177, 179-180; *Rector v. City Deposit Bank*, 200 U. S. 405, 412; *Haire v. Rice*, 204 U. S. 291, 299; *Chambers v. Baltimore, etc. Railroad*, 207 U. S. 142, 148; *Atchison, etc. Railway v. Sowers*, 213 U. S. 55, 62; *Consolidated Turnpike Co. v. Norfolk, etc. Railway*, 228 U. S. 596, 599; *Miedreich v. Lauenstein*, 232 U. S. 236, 242; *North Carolina Railroad v. Zachary*, 232 U. S. 248, 257; *Chicago, etc. Railway v. Perry*, 259 U. S. 548, 551.

And here, since it appears from the statement in the order of the Court of Appeal that the question whether the Syndicalism Act and its application in this case was repugnant to the due process and equal protection clauses of the Fourteenth Amendment, was considered and passed upon by that court—this being a Federal question constituting an appropriate ground for a review of the judgment—we conclude that this Court has acquired jurisdiction under the writ of error. The order dismissing the writ for want of jurisdiction will accordingly be set aside.

We proceed to the determination, upon the merits, of the constitutional question considered and passed upon by the Court of Appeal. Of course our review is to be confined to that question, since it does not appear, either from the order of the Court of Appeal or from the record otherwise, that any other Federal question was presented in and either expressly or necessarily decided by that court. *National Bank v. Commonwealth*, 9 Wall. 353,

363; *Edwards v. Elliott*, 21 Wall. 532, 557; *Dewey v. Des Moines*, 173 U. S. 193, 200; *Keokuk & Hamilton Bridge Co. v. Illinois*, 175 U. S. 626, 633; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 248; *Haire v. Rice*, 204 U. S. 291, 301; *Selover, Bates & Co. v. Walsh*, 226 U. S. 112, 126. *Missouri Pacific Railway v. Coal Co.*, 256 U. S. 134, 135. It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a Federal nature. *Dewey v. Des Moines*, *supra*, 199; *Keokuk & Hamilton Bridge Co. v. Illinois*, *supra*, 634. And this necessarily excludes from our consideration a question sought to be raised for the first time by the assignments of error here—not presented in or passed upon by the Court of Appeal—whether apart from the constitutionality of the Syndicalism Act, the judgment of the Superior Court, by reason of the rulings of that court on questions of pleading, evidence and the like, operated as a denial to the defendant of due process of law. See *Oxley Stave Co. v. Butler County*, 166 U. S. 648, 660; *Capital City Dairy Co. v. Ohio*, *supra*, 248; *Manhattan Life Ins. Co. v. Cohen*, 234 U. S. 123, 134; *Bass, etc. Ltd. v. Tax Commission*, 266 U. S. 271, 283.

The following facts, among many others, were established on the trial by undisputed evidence: The defendant, a resident of Oakland, in Alameda County, California, had been a member of the Local Oakland branch of the Socialist Party. This Local sent delegates to the national convention of the Socialist Party held in Chicago in 1919, which resulted in a split between the "radical" group and the old-wing-Socialists. The "radicals"—to whom the Oakland delegates adhered—being ejected, went to another hall, and formed the Communist Labor Party of America. Its Constitution provided for the membership of persons subscribing to the principles of the Party and pledging themselves to be guided by its Platform, and for the formation of state organizations conforming to its Platform as the supreme declaration of the Party. In its "Platform and Program" the Party declared that it was in full harmony with "the revolutionary working class parties of all countries" and adhered to the principles of Communism laid down in the Manifesto of the Third International at Moscow, and that its purpose was "to create a unified revolutionary working class movement in America," organizing the workers as a class, in a revolutionary class struggle to conquer the capitalist state, for the overthrow of capitalist rule, the conquest of political power and the

establishment of a working class government, the Dictatorship of the Proletariat, in place of the state machinery of the capitalists, which should make and enforce the laws, reorganize society on the basis of Communism and bring about the Communist Commonwealth—advocated, as the most important means of capturing state power, the action of the masses, proceeding from the shops and factories, the use of the political machinery of the capitalist state being only secondary; the organization of the workers into “revolutionary industrial unions”; propaganda pointing out their revolutionary nature and possibilities; and great industrial battles showing the value of the strike as a political weapon—commended the propaganda and example of the Industrial Workers of the World and their struggles and sacrifices in the class war—pledged support and cooperation to “the revolutionary industrial proletariat of America” in their struggles against the capitalist class—cited the Seattle and Winnipeg strikes and the numerous strikes all over the country “proceeding without the authority of the old reactionary Trade Union officials”, as manifestations of the new tendency—and recommended that strikes of national importance be supported and given a political character, and that propagandists and organizers be mobilized “who can not only teach, but actually help to put in practice the principles of revolutionary industrial unionism and Communism.”

Shortly thereafter the Local Oakland withdrew from the Socialist Party, and sent accredited delegates, including the defendant, to a convention held in Oakland in November, 1919, for the purpose of organizing a California branch of the Communist Labor Party. The defendant, after taking out a temporary membership in the Communist Labor Party, attended this convention as a delegate and took an active part in its proceedings. She was elected a member of the Credentials Committee, and, as its chairman, made a report to the convention upon which the delegates were seated. She was also appointed a member of the Resolutions Committee, and as such signed the following resolution in reference to political action, among others proposed by the Committee: “The C. L. P. of California fully recognizes the value of political action as a means of spreading communist propaganda; it insists that in proportion to the development of the economic strength of the working class, it, the working class, must also develop its political power. The C. L. P. of California proclaims and insists that the capture of political

power, locally or nationally by the revolutionary working class can be of tremendous assistance to the workers in their struggle of emancipation. Therefore, we again urge the workers who are possessed of the right of franchise to cast their votes for the party which represents their immediate and final interest—the C. L. P.—at all elections, being fully convinced of the utter futility of obtaining any real measure of justice or freedom under officials elected by parties owned and controlled by the capitalist class.” The minutes show that this resolution, with the others proposed by the committee, was read by its chairman to the convention before the Committee on the Constitution had submitted its report. According to the recollection of the defendant, however, she herself read this resolution. Thereafter, before the report of the Committee on the Constitution had been acted upon, the defendant was elected an alternate member of the State Executive Committee. The Constitution, as finally read, was then adopted. This provided that the organization should be named the Communist Labor Party of California; that it should be “affiliated with” the Communist Labor Party of America, and subscribe to its Program, Platform and Constitution, and “through this affiliation” be “joined with the Communist International of Moscow;” and that the qualifications for membership should be those prescribed in the National Constitution. The proposed resolutions were later taken up and all adopted, except that on political action, which caused a lengthy debate, resulting in its defeat and the acceptance of the National Program in its place. After this action, the defendant, without, so far as appears, making any protest, remained in the convention until it adjourned. She later attended as an alternate member one or two meetings of the State Executive Committee in San Jose and San Francisco, and stated, on the trial, that she was then a member of the Communist Labor Party. She also testified that it was not her intention that the Communist Labor Party of California should be an instrument of terrorism or violence, and that it was not her purpose or that of the Convention to violate any known law.

In the light of this preliminary statement, we now take up, in so far as they require specific consideration, the various grounds upon which it is here contended that the Syndicalism Act and its application in this case is repugnant to the due process and equal protection clauses of the Fourteenth Amendment.

1. While it is not denied that the evidence warranted the jury in finding that the defendant became a member of and assisted in organizing the Communist Labor Party of California, and that this was organized to advocate, teach, aid or abet criminal syndicalism as defined by the Act, it is urged that the Act, as here construed and applied, deprived the defendant of her liberty without due process of law in that it has made her action in attending the Oakland convention unlawful by reason of "a subsequent event brought about against her will, by the agency of others," with no showing of a specific intent on her part to join in the forbidden purpose of the association, and merely because, by reason of a lack of "prophetic" understanding she failed to foresee the quality that others would give to the convention. The argument is, in effect, that the character of the state organization could not be forecast when she attended the convention; that she had no purpose of helping to create an instrument of terrorism and violence; that she "took part in formulating and presenting to the convention a resolution which, if adopted, would have committed the new organization to a legitimate policy of political reform by the use of the ballot"; that it was not until after the majority of the convention turned out to be "contrary-minded, and other less temperate policies prevailed" that the convention could have taken on the character of criminal syndicalism; and that as this was done over her protest, her mere presence in the convention, however violent the opinions expressed therein, could not thereby become a crime. This contention, while advanced in the form of a constitutional objection to the Act, is in effect nothing more than an effort to review the weight of the evidence for the purpose of showing that the defendant did not join and assist in organizing the Communist Labor Party of California with a knowledge of its unlawful character and purpose. This question, which is foreclosed by the verdict of the jury—sustained by the Court of Appeal over the specific objection that it was not supported by the evidence—is one of fact merely which is not open to review in this Court, involving as it does no constitutional question whatever. And we may add that the argument entirely disregards the facts that the defendant had previously taken out a membership card in the National Party; that the resolution which she supported did not advocate the use of the ballot to the exclusion of violent and unlawful means of bringing about the desired changes in industrial and political con-

ditions; and that, after the constitution of the California Party had been adopted, and this resolution had been voted down and the National Program accepted, she not only remained in the convention, without protest, until its close, but subsequently manifested her acquiescence by attending as an alternate member of the State Executive Committee and continuing as a member of the Communist Labor Party.

2. It is clear that the Syndicalism Act is not repugnant to the due process clause by reason of vagueness and uncertainty of definition. It has no substantial resemblance to the statutes held void for uncertainty under the Fourteenth and Fifth Amendments in *International Harvester Co. v. Kentucky*, 234 U. S. 216, 221; and *United States v. Cohen Grocery*, 255 U. S. 81, 89, because not fixing an ascertainable standard of guilt. The language of Sec. 2, subd. 4, of the Act under which the plaintiff in error was convicted is clear; the definition of "criminal syndicalism" specific.

The Act, plainly, meets the essential requirement of due process that a penal statute be "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties," and be couched in terms that are not "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U. S. 385, 391. And see *United States v. Brewer*, 139 U. S. 278, 288; *Chicago, etc. Railway v. Dey*, (C. C.) 35 Fed. 866, 876; *Tozer v. United States*, (C. C.) 52 Fed. 917, 919. In *Omaechevarria v. Idaho*, 246 U. S. 343, 348, in which it was held that a criminal statute prohibiting the grazing of sheep on any "range" previously occupied by cattle "in the usual and customary use" thereof, was not void for indefiniteness because it failed to provide for the ascertainment of the boundaries of a "range" or to determine the length of time necessary to constitute a prior occupation a "usual" one, this Court said: "Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it. Similar expressions are common in the criminal statutes of other States. This statute presents no greater uncertainty or difficulty, in application to necessarily varying facts, than has been repeatedly sanctioned by this court. *Nash v. United States*, 229 U. S. 373, 377; *Miller v. Strahl*, 239 U. S. 426, 434." So, as applied here, the

Syndicalism Act required of the defendant no "prophetic" understanding of its meaning.

And similar Criminal Syndicalism statutes of other States, some less specific in their definitions, have been held by the State courts not to be void for indefiniteness. *State v. Hennessy*, 114 Wash. 351, 364; *State v. Laundry*, 103 Ore. 443, 460; *People v. Ruthenberg*, 229 Mich. 315, 325. And see *Fox v. Washington*, 236 U. S. 273, 277; *People v. Steelik*, 187 Cal. 361, 372; *People v. Lloyd*, 304 Ill. 23, 34.

3. Neither is the Syndicalism Act repugnant to the equal protection clause, on the ground that as its penalties are confined to those who advocate a resort to violent and unlawful methods as a means of changing industrial and political conditions, it arbitrarily discriminates between such persons and those who may advocate a resort to these methods as a means of maintaining such conditions.

It is settled by repeated decisions of this Court that the equal protection clause does not take from a State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary; and that one who assails the classification must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Lindsley v. National Carbonic Gas Co.*, 220 U. S. 62, 78, and cases cited.

A statute does not violate the equal protection clause merely because it is not all-embracing. *Zucht v. King*, 260 U. S. 174, 177; *James-Dickinson Farm Mortgage Co. v. Harry*, Jan. 10, 1927. A State may properly direct its legislation against what it deems an existing evil without covering the whole field of possible abuses. *Patson v. Pennsylvania*, 232 U. S. 138, 144; *Farmers Bank v. Federal Reserve Bank*, 262 U. S. 649, 661; *James-Dickinson Mortgage Co. v. Harry*, *supra*. The statute must be presumed to be aimed at an evil where experience shows it to be most felt, and to be deemed by the legislature coextensive with the practical need; and is not to be overthrown merely because other instances may be suggested to which also it might have been applied; that being a matter for the legislature to determine unless the case is very clear. *Keokee Coke Co. v. Taylor*, 234 U. S. 224, 227. And it is not open to objection unless the classification is so lacking in

any adequate or reasonable basis as to preclude the assumption that it was made in the exercise of the legislative judgment and discretion. *Stebbins v. Riley*, 268 U. S. 137, 143; *Graves v. Minnesota*, Nov. 22, 1926; *Swiss Oil Corporation v. Shanks*, Feb. 21, 1927.

The Syndicalism Act is not class legislation; it affects all alike, no matter what their business associations or callings, who come within its terms and do the things prohibited. See *State v. Hennessy*, *supra*, 361; *State v. Laundry*, *supra*, 460. And there is no substantial basis for the contention that the legislature has arbitrarily or unreasonably limited its application to those advocating the use of violent and unlawful methods to effect changes in industrial and political conditions; there being nothing indicating any ground to apprehend that those desiring to maintain existing industrial and political conditions did or would advocate such methods. That there is a wide-spread conviction of the necessity for legislation of this character is indicated by the adoption of similar statutes in several other States.

4. Nor is the Syndicalism Act as applied in this case repugnant to the due process clause as a restraint of the rights of free speech, assembly, and association.

That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question. *Gillow v. New York*, 268 U. S. 652, 666-668, and cases cited.

By enacting the provisions of the Syndicalism Act the State has declared, through its legislative body, that to knowingly be or become a member of or assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes, involves such danger to the public peace and the security of the State, that these acts should be penal-

ized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute, *Mugler v. Kansas*, 123 U. S. 623, 661; and it may not be declared unconstitutional unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the State in the public interest. *Great Northern Railway v. Clara City*, 246 U. S. 434, 439.

The essence of the offense denounced by the Act is the combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. See *People v. Steelik*, *supra*, 376. That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals, is clear. We cannot hold that, as here applied, the Act is an unreasonable or arbitrary exercise of the police power of the State, unwarrantably infringing any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the State.

We find no repugnancy in the Syndicalism Act as applied in this case to either the due process or equal protection clauses of the Fourteenth Amendment on any of the grounds upon which its validity has been here challenged.

The order dismissing the writ of error will be vacated and set aside, and the judgment of the Court of Appeal

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.



SUPREME COURT OF THE UNITED STATES.

No. 3.—OCTOBER TERM, 1926.

Charlotte Anita Whitney, Plaintiff in Error, <i>vs.</i> The People of the State of California.	In Error to the District Court of Appeal, Appel- late District, Division One, of the State of State of California.
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[May 16, 1927.]

Mr. Justice BRANDEIS, concurring.

Miss Whitney was convicted of the felony of assisting in organizing, in the year 1919, the Communist Labor Party of California, of being a member of it, and of assembling with it. These acts are held to constitute a crime, because the party was formed to teach criminal syndicalism. The statute which made these acts a crime restricted the right of free speech and of assembly theretofore existing. The claim is that the statute, as applied, denied to Miss Whitney the liberty guaranteed by the Fourteenth Amendment.

The felony which the statute created is a crime very unlike the old felony of conspiracy or the old misdemeanor of unlawful assembly. The mere act of assisting in forming a society for teaching syndicalism, of becoming a member of it, or of assembling with others for that purpose is given the dynamic quality of crime. There is guilt although the society may not contemplate immediate promulgation of the doctrine. Thus the accused is to be punished, not for attempt, incitement or conspiracy, but for a step in preparation, which, if it threatens the public order at all, does so only remotely. The novelty in the prohibition introduced is that the statute aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it.

Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth

Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights. See *Meyer v. Nebraska*, 262 U. S. 390; *Pierce v. Society of Sisters*, 268 U. S. 510; *Gitlow v. New York*, 268 U. S. 652, 666; *Farrington v. Tokushige*, No. 465, decided February 21, 1927. These may not be denied or abridged. But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled. See *Schenck v. United States*, 249 U. S. 47, 52.

It is said to be the function of the legislature to determine whether at a particular time and under the particular circumstances the formation of, or assembly with, a society organized to advocate criminal syndicalism constitutes a clear and present danger of substantive evil; and that by enacting the law here in question the legislature of California determined that question in the affirmative. Compare *Gitlow v. New York*, 268 U. S. 652, 668-671. The legislature must obviously decide, in the first instance, whether a danger exists which calls for a particular protective measure. But where a statute is valid only in case certain conditions exist, the enactment of the statute cannot alone establish the facts which are essential to its validity. Prohibitory legislation has repeatedly been held invalid, because unnecessary, where the denial of liberty involved was that of engaging in a particular business.¹ The power of the courts to strike down an offending law are no less when the interests involved are not property rights, but the fundamental personal rights of free speech and assembly.

¹Compare *Frost v. R. R. Comm. of California*, 271 U. S. 583; *Weaver v. Palmer Bros. Co.*, 270 U. S. 402; *Jay Burns Baking Co. v. Bryan*, 264 U. S. 504; *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393; *Adams v. Tanner*, 244 U. S. 590.

This Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgement of free speech and assembly as the means of protection. To reach sound conclusions on these matters, we must bear in mind why a State is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.² They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of

²Compare Thomas Jefferson: "We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and especially when the law stands ready to punish the first criminal act produced by the false reasonings; these are safer corrections than the conscience of the judge." Quoted by Charles A. Beard, *The Nation*, July 7, 1926, vol. 123, p. 8. Also in first Inaugural Address: "If there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."

reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it.³ Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through dis-

³Compare *Judge Learned Hand in Masses Publishing Co. v. Patten*, 244 Fed. 535, 540; *Judge Amidon in United States v. Fontana*, Bull. Dept. Justice No. 148, pp. 4-5; Chafee, "Freedom of Speech," pp. 46-56, 174.

cussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.⁴ Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.

Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive. Thus, a State might, in the exercise of its police power, make any trespass upon the land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this Court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross unenclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly.

The California Syndicalism Act recites in § 4:

"Inasmuch as this act concerns and is necessary to the immediate preservation of the public peace and safety, for the reason

⁴Compare Z. Chafee, Jr., "Freedom of Speech", pp. 24-39, 207-221, 228, 262-265; H. J. Laski, "Grammar of Politics", pp. 120, 121; Lord Justice Scrutton in *Rex v. Secretary for Home Affairs*, Ex parte O'Brien, [1923] 2 K. B. 361, 382: "You really believe in freedom of speech, if you are willing to allow it to men whose opinions seem to you wrong and even dangerous; . . ." Compare Warren, "The New Liberty Under the Fourteenth Amendment," 39 *Harvard Law Review*, 431, 461.

that at the present time large numbers of persons are going from place to place in this state advocating, teaching and practicing criminal syndicalism, this act shall take effect upon approval by the Governor."

This legislative declaration satisfies the requirement of the constitution of the State concerning emergency legislation. *In re McDermott*, 180 Cal. 783. But it does not preclude enquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution. As a statute, even if not void on its face, may be challenged because invalid as applied, *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, the result of such an enquiry may depend upon the specific facts of the particular case. Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature. The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the State, creates merely a rebuttable presumption that these conditions have been satisfied.

Whether in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil, might have been made the important issue in the case. She might have required that the issue be determined either by the court or the jury. She claimed below that the statute as applied to her violated the Federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed upon by the court or a jury. On the other hand, there was evidence on which the court or jury might have found that such danger existed. I am unable to assent to the suggestion in the opinion of the Court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment. In the present case, however, there was other testimony which tended to establish the existence of a conspiracy, on the part of mem-

bers of the International Workers of the World, to commit present serious crimes; and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member. Under these circumstances the judgment of the state court cannot be disturbed.

Our power of review in this case is limited not only to the question whether a right guaranteed by the Federal Constitution was denied, *Murdock v. City of Memphis*, 20 Wall. 390; *Haire v. Rice*, 204 U. S. 291, 301; but to the particular claims duly made below, and denied. *Seaboard Air Line Ry. v. Duval*, 225 U. S. 477, 485-488. We lack here the power occasionally exercised on review of judgments of lower federal courts to correct in criminal cases vital errors, although the objection was not taken in the trial court. *Wiborg v. United States*, 163 U. S. 632, 658-660; *Clyatt v. United States*, 197 U. S. 207, 221-222. This is a writ of error to a state court. Because we may not enquire into the errors now alleged, I concur in affirming the judgment of the state court.

Mr. Justice HOLMES joins in this opinion.